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DECISIONS

OF THE

COURT OF SESSION,

From the end of the year 1756, to the end of the year 1760.

K. Scotland
Session, Court of

COLLECTED BY

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ADVOCATES.

By Appointment of the FACULTY of ADVOCATES.

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DECISIONS

OF THE

COURT OF SESSION,

COLLECTED BY

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DECISIONS
OF THE
COURT OF SESSION.

N° I. 4th *January* 1757.

The JUSTICES OF PEACE and COMMISSIONERS OF SUPPLY of the county of *Berwick*,

AGAINST

The TENANTS in the parishes of *Cockburnspath* and *Coldingham*, &c.

Powers of justices of the peace, &c. *as to the application of the statute-labour for repairing highways.*

THE justices of peace and commissioners of supply of the county of *Berwick*, at several meetings for repairing the highways in that county, came to certain resolutions, importing, "That the statute-work should be converted into money:— "That the rate of every labouring man, whether cottager or tradesman, should be 4 *d.* for each day he was bound to labour, for the "first year:—That every tenant should be rated at 3 *d.* in the pound "*Sterling* of their yearly rent, in full of all labour by law to be performed by them: — That the conversion of the statute-work into money, at the above different rates, should only take place, in the "event of the persons therein liable not performing the said statute-"work, and declaring themselves willing to pay the said compositions "or rates in lieu thereof; and that it should be in the option of every "person to perform the statute-work, or to accept of and pay the composition:— That to all the intimations to be made at the different "parish-churches, a proper clause should be added, letting forth, That "this alternative was in every person's option."

They further resolved, "That two particular roads should be first "repaired; but that if any of the highways of the shire should become so bad at a particular place, as to be dangerous, or interrupt "travelling, upon proper application, orders should be given for the "immediate reparation of such dangerous place."

In consequence of these general resolutions, the inhabitants of the parishes of *Cockburnspath*, *Coldingham*, and others, were called out to work at one of the roads agreed on.

Of this order they complained by a bill of suspension: For that, 1*st*,

The road to which they were called, lay at a great diſtance from them, while other roads, much nearer to them, lay unrepaired; whereas it was the duty of the commiſſioners to have divided the county into diſtricts, agreeably to the directions of the act 16. parl. 1669, "as "they lie moſt eweſt to the ſeveral highways to be repaired, and as "they may have the moſt equal burden." 2*dly*, That the compoſition-money, which it was put in their option to pay, if they choſe not to perform the work, was higher than the act 9. parl. 1670, authoriſed; and was, beſides, proportioned by a rule authoriſed by no law; which reſembled a tax, and might be gradually raiſed to an exorbitant ſum.

It was *anſwered*, 1*ſt*, That by the ſtatutes reſpecting the highways, the juſtices of peace and commiſſioners of ſupply are appointed the ſole judges within their reſpective counties, of the proper application of the ſtatute-work. This is clear from act 38. parl. 1661, act 16. parl. 1669, act 9. parl. 1670, and act 5. *Geo.* I. By which laſt act, in particular, they are authoriſed to convene the tenants, *&c.* to work three days, "on ſuch days, *and at ſuch places*, as the ſaid commiſſioners, or their "officers, ſhall from time to time appoint." Nor can theſe powers be limited or abridged, unleſs it can be made evident, that they are wantonly perverted, to the oppreſſion of the people, and not exerciſed with a view to the general advantage of the county; which could not be affirmed in the preſent caſe, as it was the intention of the juſtices to purſue the moſt advantageous plan for obtaining good roads in this county; that of applying the whole force of the county to each particular road in its turn, till the whole ſhould be completed.

2*dly*, By the act 9. parl. 1670, the power of the commiſſioners is not limited, with reſpect to the compoſition they may take, when they are willing to diſpenſe with the actual labour. The words of that ſtatute are, "That where the ways lie at a great diſtance from thoſe who are "liable to repair the ſame, *it ſhall be leiſom to the ſaid juſtices* and over-"ſeers, to diſpenſe with thoſe perſons who live at ſuch a diſtance, "they paying ſix ſhillings *Scots* yearly for ilk man, and twelve ſhil-"lings for ilk horſe, which ought to have been employed in the ſaid "work." It is therefore *leiſom* to the commiſſioners, to take ſix pence *Sterl.* for each man, and twelve pence for each horſe; but they are not prohibited from taking more.——The method of proportioning the compoſition amongſt the tenants by their real rent, is calculated to render the burden equal. By no other means can the paſture-farms be made to bear a juſt ſhare of the trouble and expence of repairing the highways; and the rate agreed on amounted to no more than ſix ſhillings *Sterling* yearly for a rent of *L.* 24.

"The Lords found, That the juſtices of peace and commiſſioners "of ſupply have a diſcretionary power to determine what roads "ſhall be firſt repaired, and to divide the ſhire into diſtricts; but "that they cannot call out any perſons to work at the roads, who "live at ſuch diſtance, as that they cannot come and go in a "day, and work a day's work, under any higher penalty than "the 9th act, parl. 1670, directs." W. J.

Act. Johnſtone, Montgomery, R. Dundas. Alt. *G. Elliot, And. Pringle, Lockhart.* Reporter, *Shewalton.*

N° II.

N° II. 4th *January* 1757.

JOHN GOLDIE, truſtee of HENDERSON's CREDITORS,

AGAINST

KATHARINE MACDONALD, relict of *George Keir*.

Reparation of damage ariſing from neglect.

ANdrew Garden died in *Dumfrieſſhire*, in 1742. His neareſt of kin were *George*, *William*, and *Janet Keirs*, the children of his ſiſter. *William Keir* ſet up a claim to the whole executry, founding upon a letter wrote by the defunct: which induced *George*, who lived at *Alloa*, and acted as a writer, to come to *Dumfrieſſhire*; and on the 9th *Auguſt* 1742 he granted a power or factory to *John Henderſon* of *Broadholm*, who had been educated as a writer, and was then living in *Dumfrieſſhire* as a country-gentleman, and acting as factor to the Marquis of *Annandale*.

By this factory he impowered *Henderſon*, either to procure him conjoined with his brother *William* as executor, and to receive his ſhare of the effects, or to call *William* to account, if he ſhould be confirmed alone; and the factory mentioned a reaſonable gratification to be allowed him for his trouble.

Upon the 11th *Auguſt* 1742, he wrote to *Henderſon*, and ſent him a bond of cautionry in the confirmation, ſigned by *Alexander Abercrombie*; deſiring, " That if any other thing occurred to *Henderſon* that was " incumbent upon him, he would pleaſe take the trouble to write him " thereanent."

Henderſon employed a procurator at *Dumfries*; who, upon the 21ſt *December* 1742, obtained *George* conjoined as executor with his brother *William*. Of this ſentence *William* obtained an advocation; but in *January* 1744 the cauſe was remitted *ſimpliciter*, and the act and remit ſent to *Henderſon*. A petition was then given in to the commiſſary by *Henderſon*'s direction, for a warrant to value the defunct's books; and, upon the 10th *May* 1744, two perſons were appointed; who, upon the 13th *June* 1744, made their report. On the 17th *April* 1744, *Alexander Abercrombie*, the cautioner, became bankrupt, and left the country.

In *September* 1744, a letter was wrote to the commiſſary of *Dumfries*, in name of *George*, inquiring why the confirmation ſtopped; and the commiſſary wrote an anſwer, That he knew no reaſon, and that *George*'s doer might force it when he pleaſed.

Upon the 8th *January* 1745, *George* aſſigned to *Katharine Macdonald*, his wife, all his debts and effects, and particularly his ſhare of *Andrew Garden*'s executry.

In *July* 1745, *George* died; and as no confirmation had been taken out, his brother and ſiſter became the neareſt of kin, and his relict was excluded from his ſhare of the executry. She brought an action of damages againſt *Henderſon*; and obtained decreet in abſence for

L. 212, as one third of *Garden*'s executry, ſaid to have been loſt to her by his negligence.

The creditors of *Henderſon* brought a reduction of this decree; and *argued*, That a factor could not be ſubjected to damages of this kind, of which it was impoſſible to ſay he was the neceſſary cauſe: for that if *George* had thought him negligent, he had it in his power to have recalled the factory, and to have appointed another; or he might have acted himſelf, as he was appriſed of the delay by the commiſſary's letter; and that, in this caſe, it was a chance whether the delay might not have proved advantageous to *George*, by the predeceaſe of *William* or *Janet*. Beſides, *Henderſon* was not properly an agent acting before the courts at *Dumfries*, but had employed another; and it was probable the delay was owing to *George* himſelf, either becauſe he did not furniſh money, or provide a new bond of cautionry, or choſe to run the riſk of ſurvivance.

Anſwered, The negligence is apparent from the dates of the different ſteps. The anxiety of *George*, that the confirmation ſhould be immediately taken out after the remit upon the advocation, is proved by the letter wrote in his name to the commiſſary; and the commiſſary's anſwer proves, that the delay was to be imputed to *George*'s doer alone. Though *George* might have recalled the factory upon the ſuſpicion of negligence, he was not bound to recall it; *Henderſon*, who undertook the office, not gratuitouſly, was bound to execute it; and his negligence, in this caſe, was ſimilar to that of a factor neglecting to inſure a ſhip, or a meſſenger to execute a caption. The want of money, or of a new bond of cautionry, cannot be an excuſe for the delay, unleſs *Henderſon* had acquainted *George* that theſe were wanted.

" Upon the 1ſt *July* 1755, The Lords repelled the reaſons of re-
" duction of the decreet quarrelled, and aſſoilzied."

Upon a reclaiming petition, a diligence having been allowed to the creditors for recovering writings, the cauſe came again to be adviſed.

" The Lords adhered." W. J.

Act. Johnſtone, Th. Hay, Ferguſon. *Alt. Bruce, And. Pringle.* Clerk, *Kirkpatrick.*

N° III. 4th *January* 1757.

The CREDITORS of LORD CRANSTON,

AGAINST

THOMAS SCOT.

Retention of rents allowed to a tenant, and prorogation of a tack, if good againſt creditors.

LOrd *Cranſton*, in *April* 1735, granted a leaſe to *Thomas Scot*, to continue for twenty-one years, from *Whitſunday* 1734.

In

In 1750, *Scot* became cautioner for Lord *Cranſton* in a debt of *L.* 527, which he was ſoon after obliged to pay; and for his relief, Lord *Cranſton*, in *Auguſt* 1752, gave him a prorogation of his tack for three periods of twenty-one years, to commence at *Whitſunday* 1755, when the former leaſe expired, at the ſame rent as in his firſt leaſe; with a power to retain, for his payment, the fine or graſſum ſtipulated in the new tack; and alſo to retain the ſurplus rent of his farm from the 1751, over the intereſt he was previouſly bound to pay out of it to certain heritable creditors.

In the year 1754, the eſtate of Lord *Cranſton* was ſequeſtrated.

The creditors of Lord *Cranſton* by infeftments and adjudications poſterior in date, *contended*, That as poſſeſſion had not commenced upon the prorogation of *Thomas Scot*'s tack, it had not become real before the ſequeſtration; and was therefore ineffectual againſt them. And, 2*dly*, That *Scot* could not even be intitled to retain the ſurplus rents from 1751 to the time of the ſequeſtration, becauſe their adjudications and infeftments, though poſterior to the date of his new tack, became preferable to his aſſignment from their dates. And further, the ſequeſtration was preferable to ſuch aſſignment, and muſt attach all the bygone rents in the tenants hands.

Anſwered, Lord *Cranſton*, at the time of granting the prorogation, was in full poſſeſſion of his eſtate; the rent was not thereby diminiſhed; and this reaſonable act of adminiſtration could not be rendered ineffectual by the poſterior ſequeſtration; eſpecially as *Scot* was to be conſidered as a tackſman in the immediate poſſeſſion, agreeable to the deciſion *January* 1725, *Richard* againſt *Lindſay*, though the term of entry upon the prorogation of his tack was not commenced. 2*do*, The ſurplus rents from 1751 to the date of the ſequeſtration, were to be conſidered as *bona fide percepti*, and already applied for payment of the cautionary debt.

"The Lords found, 28th *February* 1755, That the bygone rents "preceding the ſequeſtration did not fall under the factory; but "that the rents in time coming, ſince the ſequeſtration, did fall "under it."

And having afterwards heard counſel upon the validity of the tack,

"Found, That the tack was not good againſt creditors, in reſpect "the tackſman did not attain the poſſeſſion of the lands ſet, by "virtue of the tack quarrelled, prior to the dates of the infeft-"ments in favour of the real creditors, or prior to the adjudica-"tions obtained at the inſtance of the perſonal creditors; and that "the ſaid creditors themſelves did firſt attain the poſſeſſion by "their factor, after a judicial ſequeſtration of the eſtate; and "therefore ſuſtained the reaſons of reduction, in ſo far as con-"cerned the intereſt of the ſaid creditors; reſerving action to the "ſaid *Thomas Scot* againſt the Lord *Cranſton* upon the perſonal ob-"ligement, as accords." W. J.

For the creditors, *Wallace ſenior*, *Lockhart*. Alt. *Johnſtone*, *Ferguſon*. Clerk, *Forbes*.

N° IV. 4th *January* 1757.

Sir WILLIAM STIRLING,

AGAINST

THOMAS JOHNSTON.

Clauſe of pre-emption without an irritancy, in a vaſſal's charter, if good againſt a purchaſer?

Linton feued to *Miller* a ſmall tenement of *L.* 40 *Scots* of yearly rent. The charter contains a clauſe, "declaring, That it ſhall not be "lawful to *Miller* to ſell or diſpone the ſaid lands, without firſt ma- "king an offer of them to *Linton* at the price originally paid for them, "and the value of improvements, *&c.*; and if he do in the contrary, "ſuch conveyances are declared to be null."

Linton conveyed his right of ſuperiority to Sir *William Stirling*; and *Miller* afterwards diſponed the property to *Johnſton*. This diſpoſition was ſought to be reduced by Sir *William*, as having been executed without any offer made to him, in terms of the clauſe of pre-emption.

Pleaded for *Johnſton*, The clauſe in this feu-charter contains no *irritancy* of the vaſſal's right. The right of the feu muſt ſtill remain with *Miller* the vaſſal; and it is inconſiſtent with the law of *Scotland*, and the nature of property, that while he remains proprietor of the lands, they ſhould not be affectable by his debts, or alienable by his deeds. The eſſence of property conſiſts in the power of alienation, which cannot be taken from the proprietor but by diveſting him of the property, and veſting it in the party to whoſe prejudice the alienation is made. This was the chief difficulty that occurred in the introduction of tailzies into this country; and the only remedy that could be deviſed to take it off was, to inſert clauſes forfeiting the heir's right in favour of the next ſubſtitute; and conſequently nothing could be carried by his deeds, when he is diveſted of the property by the condition of his right: but if ſuch irritating clauſe is emitted, debts and deeds are effectual, notwithſtanding the ſtrongeſt prohibitions. *Vide March* 11. 1707, Lady *Redheugh*, 1712, creditors of *Riccarton*.

Anſwered, Bargains may be made under any *conditions*. Where it is expreſsly ſtipulated, That the ſuperior ſhall have a right of pre-emption, there can be no reaſon why ſuch condition ſhould not be effectual. The ſuperior may reduce the ſale, to make his own right of pre-emption effectual, though the vaſſal's feu was not forfeited. In the caſe of tacks ſecluding aſſignees, the aſſignation is void; but it will not irritate the right of the cedent. And no argument can be drawn from tailzies, which derive their being from a ſtatute, and can have no effect, if the ſtatute is not literally complied with, and unleſs the proviſions of the ſtatute be ſtrictly obeyed.

Replied, Tacks are merely perſonal, founded on an *electio perſonæ*, and *exclude aſſignees*, without any *clauſe* for that purpoſe: there needs therefore

therefore no forfeiture of the tack, in order to bar the power of aſſigning; becauſe it is excluded from the nature of a tack. But in a *right* of *property*, the principles are entirely different. The power of *alienation* is eſſentially inherent in it, and cannot be barred any other way than by diveſting the diſponer of his property.

" The Lords found, That the diſpoſition by *John Miller* to *Thomas* " *Johnſton* was a valid and ſufficient right, notwithſtanding the " prohibitory clauſe in the feu-contract and charter." W. S.

Act. *G. Brown.* Alt. *Johnſtone, Ferguſon.* Clerk, *Kirkpatrick.*

N° V. 4th *January* 1757.

MARJORY CRAMOND,

AGAINST

ROBERT ALLAN.

Agreement ſettling the amount of a ſeparate maintenance, if revocable by the wife?

Robert Allan and *Marjory Cramond*, ſpouſes, having lived for ſome years in very bad terms, agreed at laſt to a ſeparation; which was executed, at the ſight of the friends of both parties, by a writing, in which he obliged himſelf to pay her, of ſeparate aliment, *L.* 5. yearly, during their joint lives; which was about one ſixth of his free eſtate; and ſhe obliged herſelf to renounce all further claim of aliment or ſeparate maintenance.

She received this ſeparate maintenance for five years; but, at the end of that term, ſued her huſband for a higher ſeparate maintenance; *pleading*, That ſhe might revoke the former agreement, as a bargain betwixt huſband and wife.

Anſwered, The reaſon on which donations *inter virum et uxorem* are revocable, is, *Ne mutuo amore ſe ſpolient*; but here was no donation of that kind, nor any fear of that conſequence; and the agreement was a ſettlement conſented to by the wife's friends, and acquieſced in by her for five years.

" The Lords found the agreement revocable." J. D.

Act. *Rae, Lockhart.* Alt. *J. Dalrymple, Craigie.*

N° VI.

N° VI. 7th *January* 1757.

Dr PETER MIDDLETON,

AGAINST

JAMES FALCONER of MONKTON.

Method of accounting for the price of a bankrupt eſtate, in regard to intereſt.

IN the year 1695, *James Falconer*'s father purchaſed the lands of *Monkton*, at a judicial ſale carried on before the court at the inſtance of the creditors of Mr *Alexander Hay*, the former proprietor; and granted a bond for payment of the price, which he obliged himſelf to pay "to the creditors of the ſaid Mr *Alexander Hay*, having rights and "diligences affecting the ſaid lands, with annualrent from the term of "*Whitſunday* 1695; and that at the firſt term of *Whitſunday*, *Lammas*, "*Martinmas*, or *Candlemas*, after they ſhould be ranked and preferred "thereto by the Lords of Seſſion, proportionally, according to their "ſeveral ſums, rights, and diligences, conform to the decreet of pre-"ference and ranking to be obtained amongſt the ſaid creditors; with "annualrent thereafter, yearly and termly, during the not-payment: "—— The ſaid creditors tranſmitting their rights and diligences af-"fecting ſaid lands and eſtate to him, with abſolute warrandice, "for the ſums by them reſpectively received."

A decreet of ranking was pronounced in *July* 1699, in which the preferable creditors were ranked in their order, to the extent of what was underſtood to exhauſt the price, and intereſts of it at that time. It would ſeem, that the perſonal poſtponed creditors had ſo ſmall expectations of getting any thing, that they did not claim to be ranked upon the ſuperplus of the price which might remain after payment of the preferable debts, but allowed the decreet of ranking to be extracted; in conſequence of which, the purchaſer made payment to the whole creditors ranked at different periods, when they called for their money.

In 1738, Dr *Peter Middleton*, having right by progreſs to a debt due to one of the poſtponed creditors, brought an action againſt *James Falconer* now of *Monkton*, for payment of the balance of the price which he alledged was ſtill due upon his father's bond, at leaſt of ſo much thereof as would ſatisfy and pay this debt. In bar of which it was pleaded for the defender, That the bond was extinguiſhed by payments made to the preferable creditors, as ranked by the decreet 1699.

It having been remitted to *Andrew Chalmer* the accountant to make out a ſcheme or calcul, from which it might appear, whether any part, or what part of the price remained in the defender's hands, he made his report, ſtating the account in two different views.

By the firſt, the debts were ſuppoſed to have been paid at the date of the decreet of ranking 1699, or, which is equivalent, that the defender was to get credit for them as then paid; in which view, there came out

out a balance due at that period of *L.* 252 : 1 : 2 *Scots*; which, with the intereſt thereof from *Whitſunday* 1699, would have been the only fund for the purſuer's payment.

But by the ſecond ſtating the account progreſſively, according to the common rules of accounting, that is to ſay, charging the defender with the ſum in his father's bond, and intereſt thereof from *Whitſunday* 1695, and giving him credit for the ſums paid to the creditors at the times when theſe payments were truly made, the balance in 1711, when the laſt payment was made, came out to be *L.* 2731 : 13 : 2 *Scots*, and, at the date of the account, amounted to *L.* 8940, 15 *s. Scots.*

The reaſon of the diſparity in the balances of the different accounts, was, that an arrear of intereſt had been due upon ſeveral of the debts, and the capital of the price bearing intereſt being greater than the capital of the debts, the balance in the purchaſer's hands came of conſequence to be increaſed proportionally to the length of time that payment to the creditors was poſtponed; and as ſome of the creditors did not receive their payment for ſeveral years after the ſale, the purchaſer had it thus in his power, from time to time, to convert the growing intereſt to a capital, bearing annualrent.

The queſtion in iſſue between the parties was, Whether the firſt or ſecond calcul ſhould be the rule of accounting?

Pleaded for the defender, The term of payment of the bond for the price was in this caſe ſuperſeded, till the firſt term after the decreet of ranking ſhould be pronounced; becauſe till then it could not be known who were the creditors intitled to receive the price: but, at that term, the purchaſer was bound to pay the price, with the intereſt and penalty correſponding thereto, to every creditor proportionally, effeiring to the ſums for which they are ſeverally preferred by the decreet of ranking, as much as if a new bond had been given to each creditor by the purchaſer for that ſum. The decreet of ranking imports an innovation or delegation in favour of every ſeveral creditor, of their ſhares of the purchaſer's bond, in the ſame manner as if it had been granted to them ſeverally, for the ſums ſpecified in the decreet; or as if the lands had been ſold by the common debtor, and the purchaſer's bond aſſigned to them to that extent. And therefore, although it ſhould be admitted, that by the terms of the purchaſer's bond, and the decreet of ranking, the creditors preferred were intitled to have had their bygone intereſts that were due at the firſt term after the decreet of ranking, accumulated into a principal, bearing intereſt, till they ſhould receive payment from the purchaſer; yet as theſe preferable creditors had not inſiſted upon this, no ſubſequent creditor can have any claim againſt the purchaſer, upon pretence that a prior creditor may have accepted of a leſs ſum than was truly due to him. The price is a debt due by the purchaſer, not to the common debtor, nor to the creditors *in cumulo*, but to each creditor ſeverally as ranked: and as no creditor can pretend to have any intereſt in the ſhare of another, ſo neither can he reap any benefit from an abatement given to the purchaſer of a part, either of the principal or intereſt, ſo as to claim more than the preciſe ſum allotted to him by the decreet. As the preferable debts, therefore, which the defender's father was decerned to pay by the decreet of ranking, did exhauſt the whole of the price, excepting only a balance of *L.* 252 *Scots*, as appears from the firſt calcul, that alone ought to be

made the rule; and the defender is willing to account for that ſum with annualrent *retro* ſince the year 1699. It cannot be pretended, that the poſtponed creditors, if they had appeared for their intereſts at the date of the decreet of ranking, could have claimed more than that ſum; ſo that it muſt appear quite inconſiſtent to argue, that the purſuer's plea is better now than theirs would have been at that time. When the purſuer lays claim to more than that ſum, he claims what might have belonged to other creditors, but what they themſelves did not demand; and therefore what he can have no manner of right to.

Anſwered for the purſuer, A ſale of a debtor's eſtate, whether voluntary or legal, for payment of his creditors, cannot in any degree innovate or alter the ſtate of the debts themſelves, while they remain unpaid. In a judicial ſale, ſuch as the preſent, where the lands are purchaſed by a third party, for a price payable to the creditors, as they ſhould thereafter be ranked, there is no principle in law from which to infer, that the debts are either innovated or extinguiſhed, till actual payment is made. By ſuch ſale the creditors are not diveſted of their ſecurities upon the lands ſold; for although the lands are adjudged to belong to the purchaſer, yet it is not ſimply, but conditionally, upon his making payment to the creditors of the price and intereſt. The creditors ſtill retain their original ſecurities, as if no ſale had been; inſomuch that if the price of the eſtate could not be recovered from the purchaſer, or his ſureties, by reaſon of their bankruptcy, ſo as to make another ſale neceſſary, in ſuch ſecond ſale, the former creditors would not rank with the creditors of the firſt purchaſer, but, by virtue of their original ſecurities, would be paid out of the firſt and readieſt of the price, as if no ſecond bankruptcy or ſale had been; which is a demonſtration, that the ſale of a bankrupt's eſtate makes no innovation of the debts or ſecurities which the creditors had obtained.

The accumulation and diviſion of the price, whether at the period of the ſale, ſince the regulations 1695, or of the decreet of ranking in ſales, prior to thoſe regulations, was ſolely intended for the benefit of the creditors, without any view to the purchaſer, who was not conſidered as having any intereſt how the ſum by him due was divided amongſt the creditors. He was debtor in a preciſe ſum, and intereſt thereof from the term of payment in his bond. How that ſum was divided among the creditors, was a matter he had no concern with, provided they demanded no more from him than the principal ſum in his bond, and intereſt thereof, ſo long as any part thereof remained unpaid. And therefore, ſuppoſing that when the creditors came to be ranked among themſelves, the preferable creditors might, in terms of the purchaſer's bond above recited, have inſiſted to have had decreet for their original principal ſums and bygone intereſt, and for the intereſt of theſe in time coming, as then accumulated; if they choſe to wave that claim for accumulations, and were ſatisfied to take decreet in common form for their principal ſum, and intereſt thereof, bygone and in time coming, there is no reaſon why the purchaſer ſhould thereafter be permitted to enlarge the claim of theſe creditors, to the prejudice of the other poſtponed creditors, or to aſſume to himſelf an advantage which the preferable creditors neither claimed nor took.

But, in fact, by the decreet of ranking the creditors are only ranked for the principal ſums due to them, and annualrents, *bygone and in time*

time coming, during the not payment; whence it is plain, that every creditor's principal ſum was intended to remain bearing intereſt from the date, without any accumulation, until payment ſhould be made by the purchaſer; and conſequently, that the account ought to be ſtated in a progreſſive manner, according to the dates of the reſpective payments made to the creditors, conform to the ſecond ſcheme or calcul in the accountant's report. And when the defender is found accountable, agreeable to that calcul, charging him with the ſum in his father's bond, and intereſt from *Whitſunday* 1695, and giving him credit for the ſums paid to the creditors, periodically as theſe payments were made, he cannot complain of the leaſt hardſhip or injuſtice, nor will he thereby pay one farthing more than was truly due by his father's bond for the price.

The court ſeemed to lay a good deal of weight upon the terms of the decreet of ranking, by which the creditors are only ranked for their principal ſums, and *annualrents, bygone and in time coming, during the not payment*; and,

" Found, That the defender, *James Falconer* of *Monkton*, as repreſent-
" ing his father, ought to be charged with the principal ſum in
" his father's bond, and the intereſt thereof; as alſo, That he
" ſhould have credit for the ſums paid to the creditors, of the
" dates when theſe payments were truly made: And therefore
" that the ſecond ſcheme or calcul ſhould be the rule of account-
" ing betwixt the purſuer and defender." G. C.

Act. *Montgomery, Lockhart.* Alt. *Brown, Ferguſon.* Clerk, *Home.*

N° VII. 7th *January* 1757.

Sir WILLIAM DUNBAR, and others, BURGESSES of the borough of *Forres*,

AGAINST

Captain JOHN MACLEOD younger of *Macleod*, and others, MAGISTRATES of the ſaid borough.

Whether non-reſiding burgeſſes can be choſen counſellors of a borough-royal.

AT the *Michaelmas* election 1754, a double election having been made in the borough of *Forres*, by oppoſite parties, mutual complaints were preferred to the court, founded on the acts of the 6th and 17th of his preſent Majeſty, reſpecting elections.

At the ſame time, as Captain *Macleod* and his party had choſen ſeveral country-gentlemen, who did not reſide in the borough, to be counſellors, Sir *William Dunbar*, and his adherents, brought a reduction of the election made by Captain *Macleod* and his party, and a declarator, That none but burgeſſes reſidenters in *Forres* could be counſellors.

In this declarator, the purſuers *inſiſted*, That by the maxims of the *Roman* law, as well as of the law and practice of the modern nations in *Europe*, it was eſtabliſhed, That the common affairs of the community

nity ſhould be committed to the ſole direction and adminiſtration of ſuch as were actual inhabitants and members of the borough; *Domat. l.* 1. *tit.* 16. § 4.; *l.* 1. *C. Quemad. civ. munic.*; *l.* 14. § 3. *ff. De mun. et honor.*; *l.* 24. *ff. De municip.*

And that the like general policy anciently took place in the conſtitution of boroughs in *Scotland*, appears from the *leges burgorum*, and many of our acts of parliament; and it was ſpecially enacted by particular acts in later times, that none but inhabitant-burgeſſes could be elected into the offices of magiſtrates or officers of boroughs; *act* 108. 1487, *act* 26. 1535, *act* 8. 1609. And although theſe later ſtatutes ſeem only to relate to the election of magiſtrates, yet they plainly ſhow the ſenſe of the legiſlature; and that the nature and conſtitution of the boroughs diſallow of admitting ſtrangers to be even common counſellors, or to have any hand in the adminiſtration of the borough. And the reaſon why there is no particular act of parliament diſcharging thoſe who do not reſide in the borough to be choſen counſellors, is becauſe this deviation from the rules and conſtitution of boroughs, and the incroachments of ſtrangers into the office of counſellors, has only taken place in later times; but as the ſame principle and reaſon apply in both caſes, the analogy of theſe ſtatutes as to the magiſtrates requires the ſame determination as to counſellors; and it is the duty, and in the power of the court, to apply the remedy pointed out by the legiſlature, now that this abuſe or grievance has crept in. And as it is clear, that none but reſiding burgeſſes can carry on trade or merchandiſe in a borough; that none but reſiding burgeſſes can exerciſe a craft within borough, as was found 1ſt *December* 1738, in *Macduff*'s caſe; and that none but reſiding burgeſſes can be magiſtrates or officers; ſo it muſt follow, that reſidence is a neceſſary quality in counſellors, who have the whole adminiſtration of the funds and affairs of the community intruſted in their hands, and who are juſtly ſuppoſed to be more attentive to the intereſt of the borough, and more capable to manage its concerns, than ſtrangers.

Anſwered for the defenders, The texts of the Civil Law, referred to by the purſuer, do not apply; and a contrary rule is eſtabliſhed by *l.* 29. *ff. De municip. l.* 1. *C. De municip.* and *l. ult. eod.*

The acts of parliament founded on are in deſuetude, particularly ſuch of them as require, that the provoſt ſhould be an inhabitant-burgeſs, as was found in the caſe of the borough of *Dumbarton*. And although they were ſtill in force, they no way concern the qualifications of common counſellors; and it is beyond the power of the court to extend theſe acts to caſes which they have not provided for. On the contrary, as the aid of the legiſlature was neceſſary to confine the office of magiſtrates to inhabitant-burgeſſes, ſo nothing leſs than the legiſlative power is ſufficient to confine the office of counſellors to inhabitant-burgeſſes, and to exclude other burgeſſes from that privilege. And ſo this queſtion was decided in the caſes of the boroughs of *Dumfries* and *Aberbrothock*; and in the caſe of *Wick*, decided 14th *June* 1749: and the practice of moſt of the boroughs in *Scotland* is agreeable thereto; and particularly of this borough of *Forres*, in which, as far back as the records go, there appears to have been almoſt conſtantly ſome members of the council who were not reſiding burgeſſes.

Replied for the purſuers, The acts of parliament are only appealed to, as

as tending to ſhew the nature of the policy and conſtitution of the boroughs. As they regard the public police of the country, they cannot in general go into diſuſe; and were, on the contrary, expreſsly renewed by a royal proclamation in 1626; and again, after the reſtoration, by a proclamation of the privy council. As to the deciſions referred to, when an argument proceeds upon the public law of the country, it is ſubmitted, how far a deciſion of a court is a proper anſwer, as no court, however ſupreme, is ſuperior to the law, or can have a power to abrogate it: but, more particularly, the deciſions in the caſes of *Dumbarton*, *Dumfries*, and *Aberbrothock*, as they appear marked in the *Dictionary*, were founded on ſpecialties, and do not apply here; and the deciſion in the caſe of *Wick* cannot have great weight, as the court varied in their judgment upon it; and even the laſt judgment given, finding, that at leaſt a majority of the counſellors behoved to be reſidenters, muſt have proceeded, ſo far as it went, upon the principles here pleaded, which do not allow us to ſtop ſhort, but plainly require reſidence in every counſellor. With regard to the general practice of boroughs, it has been various in different places, owing to the abuſe complained of. In the borough of *Forres*, the inſtances have been few, and are far from amounting to a fixed or immemorial cuſtom.

Obſerved on the bench. Our public ſtatutes may go into deſuetude. In which reſpect we differ from the law of *England*. And although the eſſence of the conſtitution of a borough was, originally, that it was to be governed only by its own members, reſiding within the borough; yet in later times this has been departed from: and as the law of elections is conſuetudinary, the practice of every borough muſt be the rule. The ſet of this borough does not limit the election of counſellers to reſidents. And there is no redarguing the ſet of a borough, unleſs by proving immemorial cuſtom contrary thereto.

" The Lords found, That there is no neceſſity for the counſellors of " *Forres* to be reſident burgeſſes; and therefore aſſoilzied from " the declarator."

G. C.

Act. A. Pringle. *Alt.* Ro. Bruce.

N° VIII. 7th *January* 1757.

Sir JOHN DOUGLAS of *Killhead*, Baronet, purſuer,

AGAINST

WILLIAM ELLIOT writer in *Edinburgh*.

Backbond relating to a bill, if good againſt a creditor to whom the bill was indorſed in ſecurity?—— If good againſt other creditors for whoſe behoof the bill was alſo indorſed?

William Scot drover, being debtor to *William Elliot* writer in *Edinburgh* in conſiderable ſums, in *December* 1746 executed an aſ-

 ſignation

ſignation of his effects in ſecurity to the ſaid *William Elliot*, for himſelf, and as truſtee for *Scot*'s other creditors; firſt, in payment of a bond for *L.* 200 due by *Scot* to *Elliot* himſelf; ſecondly, for relief of two bills for *L.* 300, which *Elliot* ſtood bound in for *Scot*, and which he was afterwards obliged to pay; and next, in truſt for behoof of the other creditors of *Scot*. This aſſignation particularly conveyed a bill dated 25th *June* 1746, drawn by *Irvine*, *Scot*'s partner, and accepted by Sir *John Douglas* of *Killhead*, and *George Douglas* merchant in *Hitchill*, for *L.* 450, payable to the ſaid *William Scot*; which bill *Scot* aſſured *Elliot* was a juſt and true debt; and in that belief *Elliot* proceeded, in the year 1747, to lead an adjudication againſt Sir *John Douglas*'s eſtate, in payment of this bill, and ſome other debts.

Sir *John Douglas* afterwards brought an action of reduction of the foreſaid bill of *L.* 450, and the adjudication following thereon, *alledging*, That this bill had been granted by him, without any onerous cauſe, or value paid for it; and that it was only intended as a fund of credit for *Scot*: in proof of which he produced a letter ſigned by *Scot* and *Irvine*, of the ſame date with the bill, and addreſſed to Sir *John Douglas* and his co-obligant, in the following terms: " Gentlemen, " Whereas you have, of this date, accepted a bill for *L.* 450 *Sterling*, " to *William Scot* or his order, we hereby oblige ourſelves to relieve you " of the ſaid ſum, and all expences that may happen to ariſe on ſaid " bill."

From which the purſuer *contended*, That as this bill had not been granted by him for value received, but only as a fund of credit to *Scot* and *Irvine*, however effectual it might be to an onerous indorſee, who had paid value for it, it could not have any privilege as a bill, when it was not indorſed for value inſtantly paid, but as a ſecurity for debts contracted, or to be contracted: That then it was to be conſidered as no better than a common aſſignation, where the aſſignee was ſubject to the backbonds or qualifications granted by the cedent before the aſſignation.

Anſwered for the defender, That he was in every reſpect an onerous indorſee to this bill; as it was upon the faith of it, and the other debts aſſigned to him, that he had, in various tranſactions, engaged his credit for *Scot*, and allowed him to become debtor to him of new for upwards of *L.* 500.

That it is a certain rule, and become in a manner the law of nations, That a bill of exchange is conſidered as a bag of money.—That in conſequence of this, no backbond or obligation of the drawer or indorſer of the bill to the acceptor, can have any effect againſt an indorſee for valuable conſiderations.—And after a bill goes out of the acceptor's hands, he can truſt to no ſeparate ſecurity from the drawer, or porteur of the bill; but muſt hold himſelf bound to pay it in whatever third hand it appears, and muſt operate his relief from the original creditor.

" The Lords found, That the letter or backbond granted by *Scot* " and *Irvine* to the purſuer Sir *John Douglas*, did not affect the " debts properly due to *William Elliot* himſelf; and therefore re- " pelled the reaſons of reduction in ſo far as concerned the ſaid " debts, and aſſoilzied *William Elliot*."

The

The next queſtion was, How far the bill, and the adjudication founded upon it, could be effectual to the defender, as truſtee for *William Scot*'s other creditors, for whoſe behoof the bill was alſo aſſigned?

Pleaded for the purſuer, That it could not be pretended, that any of theſe creditors truſted *William Scot* on the faith of this bill, as all their debts were contracted prior to the date of the aſſignation; nor was the bill ever in the cuſtody of any perſon but *William Elliot* the defender, their truſtee, in whoſe poſſeſſion it ſtill remained; that therefore they could in no ſenſe be held as onerous indorſees; and that all objections competent againſt the cedent muſt, agreeable to the eſtabliſhed principles of law, be good againſt them, his aſſignees, as in the caſe of every common aſſignation.

Anſwered for the creditors, In this caſe, *William Elliot* obtained the truſt-aſſignation from *Scot*, *optima fide*, for behoof of *Scot*'s creditors.—It was certainly a juſt cauſe for *Scot* to aſſign this bill in ſecurity and payment of his onerous debts. The bill in queſtion was conceived in the moſt regular ſtyle, having all the appearance of a fair bill *in re mercatoria*; and therefore, being a proper ſubject of commerce, ought to be ſupported to every party who procured a right to it honeſtly and fairly, for valuable conſiderations.—There was here an onerous cauſe, or a valuable conſideration given for it by the creditors, in ſo far as, by that aſſignment, they were, upon the faith of the debt's being juſt, put off from doing diligence againſt the debtor, whereby they might have recovered their payment. When bills are thus aſſigned, they may be juſtly looked upon as the moſt certain funds for the relief of creditors, who have reaſon not to ſuppoſe them, like other perſonal obligations, to be ſubject to the backbonds of the indorſers or the cedent.—If the creditors had diſcharged their debts upon getting a transference of this bill, it would undoubtedly have been ſupported againſt the effects of *Scot*'s backbond, becauſe they had thereby paid a valuable conſideration for it. So, in the preſent caſe, though they did not, in form, diſcharge their debts; yet they nevertheleſs paid full value for this bill, when, upon the faith of it, they delayed to do diligence, and in effect would loſe their debts if it was not ſuſtained.—The very deſign of the bill in this caſe, as the purſuer himſelf inſiſted, was, to procure credit for *Scot*, and to give him the appearance of funds, either to entice people to make further advances to him, or to perſuade his former creditors to be eaſy, which probably they would not have otherwiſe been; and therefore, as this bill was granted as a fund of credit, and made uſe of as ſuch by *Scot*, when he aſſigned it to his creditors, in ſecurity, and thereby obtained a delay of diligence from them, which was equal to the contracting a new debt upon the faith of it, it was moſt reaſonable, that Sir *John* ſhould ſtill be liable to pay it.—That it would have the moſt pernicious conſequences, to allow bills, ſeemingly good, to be put into a trading man's hands, which at the ſame time might be rendered ineffectual by latent backbonds. And the court has been in uſe, in queſtions with aſſignees, to pay no regard to diſcharges granted of even date with the bonds; 4th *December* 1665, *Thomſon contra Henderſon*; 21ſt *January* 1680, *Caddel contra Raith*; 11th *June* 1708, *Bundie contra Kennedy*.

A ſeparate objection was made on the behalf of the creditors to this backbond, or letter, *viz.* That though it ſeemed to be intended as a bond

bond of relief to the purſuer, and as ſuch was in a matter of importance; yet it had none of the neceſſary ſolemnities of a formal deed, nor was it holograph of the granter. — And ſuppoſing it could be ſuſtained as a holograph deed, inferring an obligation upon *Scot*; yet as it only made its appearance lately, there was no evidence that it was granted prior to the aſſignation to the creditors: nor could it prove its date againſt the defender, their truſtee, in this more than in other caſes in which the law would not hold it probative; of which a variety of inſtances are to be found in the *Dictionary of Deciſions, vol. 2. p. 158.*

" The Lords found, That the ſaid letter or backbond did affect the " debts due to the other creditors, which were contracted prior to " the date of the bill in queſtion; and therefore ſuſtained the rea- " ſons of reduction of the ſaid bill, and adjudication following " thereon, againſt them, and *William Elliot* their truſtee: And " refuſed a reclaiming petition for the creditors, without an- " ſwers." G. C.

Act *Hugh Dalrymple*. Alt. *Andrew Pringle*. Clerk, *Forbes*.

N° IX. 12th *January* 1757.

JOHN MACLAUCHLAN of *St Coan's*,

AGAINST

JOHN CAMPBELL.

Heirs and aſſignees whatſoever found to import heirs-male.

IN 1660, *John Macdougal* of *Dunnollie* granted a wadſet-right of part of the lands of *Ballemoir* to Mr *John Maclauchlan* miniſter at *Seal*, *his heirs-male and aſſignees*, redeemable by payment of 3200 merks; upon which ſeiſin followed.

In 1663, *Dunnollie* granted a ſecond wadſet-right to Mr *John Maclauchlan* miniſter at *Kilnynver*, the ſon of the firſt wadſetter, which was executed in the form of a mutual contract. It recited the firſt wadſet to *heirs-male*; and in reſpect that Mr *John* the younger had right to the 3200 merks, as heir to his father, and that he had advanced to *Dunnollie* another ſum of 3000 merks, therefore, in ſecurity of both ſums, extending to 6200 merks, *Dunnollie of new ſold* and diſponed to the ſaid Mr *John*, *his heirs and aſſignees whatſomever*, the whole ſix merk land of *Ballemoir*, &c.: but immediately after the diſpoſitive clauſe followed an obligation to infeft the ſaid Mr *John*, *his heirs-male and aſſignees whatſomever*.—Moſt of the other clauſes bore, in general, Mr *John and his foreſaids*; but in the clauſe of redemption, Mr *John* obliged him, *his heirs and aſſignees whatſomever*, to grant a letter of reverſion; and in caſe of redemption, *Dunnollie* became bound to pay the 6200 merks to Mr *John*, *his heirs*, *executors*, *or aſſignees whatſomever*.

This contract did not contain a precept of ſeiſin; but of the ſame date *Dunnollie* granted a charter, bearing to be in implement of and conform to the contract, which was there held as repeated; but nevertheleſs

theleſs confirming the right to Mr *John*, *heredibus ſuis et aſſignatis quibuſcunque*. Upon this charter Mr *John* was infeft. He was ſucceeded by his eldeſt ſon *John*; who made up no titles, but poſſeſſed the lands till his death in the 1710, leaving only a daughter, *Margaret*; and thereupon the poſſeſſion was aſſumed by the other younger ſons of old Mr *John*, and their ſons, as heirs-male, but without making up titles.

In 1752, *John Campbell*, the ſon of *Margaret* the daughter, obtained himſelf ſerved *heir of line* in ſpecial to Mr *John* the original wadſetter; but his ſervice was challenged in a reduction and declarator at the inſtance of Mr *John Maclauchlan* of *St Coan's*, the *heir-male* of the wadſetter.

Pleaded for the purſuer, The intention of the original wadſetter, to take the right to his *heirs-male*, and not to his *heirs of line*, is plain, not only from the conception of the firſt wadſet-right, to which the ſecond refers, but alſo from the obligation to infeft contained in the contract in queſtion, which is taken expreſsly to *heirs-male:* and although, in the diſpoſitive clauſe, the right is given to *heirs and aſſignees whatſoever*; yet that muſt be underſtood to mean *heirs-male*; becauſe the term *heirs-male* has a certain and definite meaning, quite incompatible with a deſtination to *heirs-female*; but *heirs and aſſignees whatſoever* may, and often does, comprehend *heirs-male*. Had not heirs-male been intended to be preferred, they never would have been mentioned in any part of the deed. And as for the charter to *heirs whatſoever*, it cannot alter the caſe, ſeeing it refers to the contract, and is expreſsly meant to complete and confirm, not to alter it. — Beſides, by the old Feudal law, rights taken to *heirs whatſoever* were conſtructed *male fees*; and to this day, in the highlands of *Scotland*, where thoſe lands lie, few eſtates are deviſed to heirs-female.

Anſwered for the defender, It is more reaſonable to preſume the wadſetter's intention to have been, that the right ſhould go to heirs of line than to heirs-male. Heirs-male are only mentioned in one clauſe, which might be by miſtake; whereas *heirs whatſoever* occur in different clauſes. The charter is expreſsly ſo conceived, and infeftment followed upon that charter. It matters not what were the ancient rules of feudal ſucceſſion, when military ſervices and tenures were in uſe; for now it is eſtabliſhed, that a deſtination to *heirs whatſoever* will carry an eſtate to a *nearer heir-female*, in preference to a *remoter heir-male*.

" The Lords ſuſtained the reaſons of reduction of the defender's ſer-
" vice as heir of line, and decerned in the declarator at the in-
" ſtance of the heir-male." D. R.

Act. *Rae, Lockhart.* Alt. *Burnett.*

N° X. 19th *January* 1757.

The EARL of BUCHAN,

AGAINST

His FATHER's CREDITORS.

Perſonal creditors of an heir of entail, purchaſing the real debts affecting the eſtate, if intitled to apply the rents to pay the perſonal debts, to the prejudice of the next heir of entail?

IN 1664, Sir *James Stuart* of *Strathbrock* executed an entail of his eſtates of *Strathbrock* and *Kirkhill*, containing the uſual prohibitive and irritant clauſes.

Upon the death of Sir *James* and his male iſſue, the ſucceſſion devolved upon *Katharine Stuart*, Sir *James*'s youngeſt daughter, who had intermarried with *Henry* Lord *Cardroſs*.

At the time this ſucceſſion opened, the eſtates ſtood charged with debts to a conſiderable extent, which had been contracted by the maker of the entail, and his ſon the firſt inſtitute, who was not bound by the prohibitions in the entail; and theſe debts were ſoon after made real againſt the eſtate by adjudications, and charter following thereon.

David late Earl of *Buchan* ſucceeded to the entailed eſtate after the death of the ſaid *Henry* Lord *Cardroſs* and *Katharine Stuart*, his father and mother; and he having alſo contracted conſiderable debts, which could not affect the entailed eſtate, his creditors proceeded to diligence againſt him, by adjudging his liferent of the eſtate, and arreſting the rents. This brought on a competition, in 1733, among the ſeveral creditors, and produced a ſequeſtration, which continued till the Earl's death in *October* 1745. The creditors were claſſed, and afterwards preferred as follows.

1*ſt*, The real creditors of Sir *James Stuart*, the maker of the entail, and of his ſon, the firſt inſtitute.

2*dly*, The ſon of the late Earl of *Buchan*, for an annuity of *L.* 300 *Sterling*, which had been aſſigned to him out of the rents, under the deſignation of *Lord Cardroſs*, by his father the late Earl, for an onerous cauſe; in virtue of which he had been in poſſeſſion ſeveral years before the rents had been affected by the other creditors.

3*dly*, The creditors of the late Earl, who had affected the rents by their adjudications or arreſtments after Lord *Cardroſs* had entered into poſſeſſion of the annuity above mentioned.

The greateſt part of the real creditors in the firſt claſs, and afterwards the Earl of *Bachan*, who had been preferred in the ſecond place for his annuity, obtained warrants upon the factor for payment of their principal ſums and annualrents.

The perſonal creditors of the late Earl in the third claſs, foreſeeing, that the effect of theſe warrants would be, to carry off the rents of the eſtate in the factor's hands, which had fallen due during the late Earl's lifetime, applied to the court by petition, ſetting forth, That their

their competitors, the real creditors, were abſolutely ſecured upon the fee of the entailed eſtate; that therefore it was emulous in them to deprive the perſonal creditors of the *interim* rents during their debtor's life, which was the only fund of their payment; and concluding, that the real creditors *ought*, in ſo far as they ſhall recover payment out of the rents during the late Earl's life, to aſſign to the perſonal creditors, thereby to enable them to recover their debts againſt the eſtate itſelf. The Lords, upon adviſing this petition, and anſwers for Lord *Cardroſs*, on the 1ſt *December* 1738, found, *That the preferable creditors ought not to aſſign, in ſo far as concerns the entailed eſtate.*

The perſonal creditors being thus diſappointed, were adviſed to tranſact with the real creditors; and accordingly purchaſed their rights which affected the fee of the entailed eſtate; and having thus acquired the real debts, they waved their preference on the rents which had become due preceding the 1745, during the late Earl's life, and then in the factor's hands, amounting to *L.* 2600 *Sterling*, and claimed theſe rents in virtue of their adjudications, while the preferable debts were left ſtanding out, as an effectual burden upon the entailed eſtate.

Compearance was made for the preſent Earl of *Buchan*, and it was *pleaded* for him, *1ſt*, That the real creditors *could not* aſſign their debts to the perſonal creditors: That they were barred by the above-recited interlocutor 1ſt *December* 1738, which was a *res judicata*. *2dly*, That as the real creditors had been preferred by an interlocutor in *July* 1737, and in conſequence of that interlocutor had obtained warrants upon the factor for their payment, they could not wave this preference, in prejudice of the preſent Earl of *Buchan*, the heir of entail.

Anſwered, to the firſt, The import of the interlocutor in *December* 1738, was no more than this, That the court did not think fit to interpoſe to oblige the heritable creditors to aſſign their debts to the arreſters; but it was not intended by the interlocutor, to reſtrain the real creditors in the free diſpoſal of their property, which was a thing beyond the power of any court to do. The queſtion was not, Whether they had power to aſſign to any perſon they pleaſed upon payment? which could never admit of a doubt; but, Whether they could be *forced* to do it? which the Lords did not think they could, as the circumſtances of the caſe then ſtood.

To the ſecond, That it was a general maxim of the law of *Scotland*, That a creditor might proceed to all ſort of diligence, whether real or perſonal, againſt his debtor's eſtate; and he might either ſtop ſhort, or convey his debt; and the purchaſer might, in the ſame manner, paſs from any part of his diligence, provided he did it not emulouſly, to the prejudice of a fellow-creditor, without advantage to himſelf. In the preſent caſe, the perſonal creditors waved the preference given to the real debts that were in their perſons upon the rents of the eſtate, in order that they might apply them to the payment of their perſonal debts, for which theſe rents were the only fund. That no rule of law or equity could oblige them to uſe the rights they they had acquired, to their own prejudice; and it was competent to them to apply their diligence ſo as they might ſave both debts, if they could; as was determined by the court, *February* 2. 1715, Brigadier *Preſton contra* Colonel *Erſkine*.

" The

" The Lords found, That the creditors were intitled to apply the " rents in queſtion to the payment of the perſonal debts due to " them, after payment of the annualrents of the heritable debts " affecting the entailed eſtate incurred during the life of the de- " ceaſed *David* Earl of *Buchan*." G. C.

Act. *A. Pringle.* Alt. *Ferguſon.* Reporter, *Kilkerran.* Clerk, *Forbes.*

N° XI. 11th *February* 1757.

LUDOVICK GRANT,

AGAINST

CHARLES MACLEAN.

Whether the defence ariſing from three conſecutive diſcharges, can be taken off by contrary preſumptions?

IN *July* 1718, *William Fraſer*, as factor for the Duke of *Gordon*, obtained decreet againſt *John Maclean* for *L.* 533 : 6 : 8 *Scots*, as the feu-duty of his lands for the years 1715, 1716, and 1717. The factor raiſed and executed horning on this decreet 18th *June* 1719; and, at a clearance the ſame year, aſſigned the decreet and diligence to the Duke.

The factor received, on the 10th *June* 1719, the feu-duty for the year 1718, and gave a diſcharge for that, and afterwards two other diſcharges for the ſubſequent feu-duties of the years 1719 and 1720; after which a new factor was appointed, and the feu-duties for the following years were regularly paid and diſcharged.

The Duke died in 1728, and his executrix brought an action, in 1745, againſt *John Maclean*, for the *L.* 533 : 6 : 8, and for annualrents, *nomine damni*, from *July* 1718; and obtained decreet in abſence.

A proceſs was brought upon this decreet, againſt *Charles Maclean*, the ſon of *John*, at the inſtance of *Ludovick Grant*, as aſſignee of the executrix. There was produced in defence the three conſecutive diſcharges 1718, 1719, 1720, and alſo regular diſcharges from that time to the 1751; and theſe were *pleaded* on as affording a preſumption of payment ſufficient to cut off the debt.

Anſwered, The preſumption ariſing from three conſecutive diſcharges admits of contrary evidence. It does not exclude a reference to oath, or proof by writing. It may be alſo taken off by contrary preſumptions. Three diſcharges granted to a ſon, do not found a preſumption, that bygones due by his father were paid. One diſcharge for three terms has not been found ſufficient; nor two years diſcharges, and partial receipts for the third. Three diſcharges by a factor are not ſufficient; nor two diſcharges granted by a father, and the third by his ſon. And, upon the ſame principles, a bond granted for bygones will be ſuſtained, notwithſtanding three poſterior diſcharges. Theſe caſes have been decided. And a decreet ought to have the ſame effect with a bond. In this caſe, not only was a decreet obtained before the factor granted the firſt diſcharge, but he had aſſigned that decreet to the Duke before he granted

granted the other two; and the production of all the diſcharges from the 1718 to the 1751, ſhows, that no diſcharges had ever been granted for the three years in queſtion, otherwiſe they would have been preſerved; beſides, that *John* the father allowed a ſecond decreet to go againſt him in abſence in 1745, when, if he had appeared, *reſting owing* could have been proved by his oath.

"The Lords found the defender liable for the ſums purſued for."

Upon a reclaiming petition,

"They reſtricted the claim to the principal ſum, without allowing "annualrents."

W. J.

Act. *Johnſtone.* Alt. *Hamilton-Gordon.* Clerk, *Kirkpatrick.*

N° XII. 15th *February* 1757.

ZACHARIAS ALLASON,

AGAINST

JOHN WATSON writer to the ſignet.

Price ſtipulated for flour-ſacks not returned, if penal or not? — Who is bound to prove the identity?

Alexander Elliot, as acting for *Robert Freeman* at *Lynn*, agreed to ſell a quantity of flour to *Allaſon*, under condition, that *Allaſon* ſhould return the ſacks in three months, or pay 2 *s.* for each undelivered ſack.

Allaſon offered to return ſacks equally good; but affirmed, That it was impoſſible for him to return the ſame ſacks, as they had been mixed with a great number of others.

John Watſon, as acting for *Freeman*, *inſiſted* for payment of 2 *s.* in place of each ſack, unleſs the defender would deliver, upon oath, the ſame ſacks he had received.

The Judge-Admiral found, That the ſame ſacks muſt be redelivered, or 2 *s.* paid for each.

Pleaded for *Allaſon*, in a bill of advocation, That the 2 *s.* ſtipulated for each ſack undelivered, was penal; and therefore ought not to be decreed when ſacks equally good were offered. — 2*dly*, That he could not be obliged to ſwear to the identity; but that the purſuer ought rather to be appointed to make oath as to the marks of the ſacks which he demanded back.

Anſwered, The 2 *s.* for each ſack is no penalty, but the real value of a ſack which has been a little uſed, the original price being 2 *s.* 6 *d.* — 2*dly*, The purſuer cannot be obliged to ſpecify the marks of the ſacks delivered: they were committed to the care of the defender, who had it in his power to have kept them ſeparate from all others; and therefore the purſuer is intitled to prove, by the defender's oath, that the ſacks offered are not the ſame. The defender might indeed be intitled to refer it back to the purſuer's oath, that they are the ſame; but as

the purſuer could not, from the nature of the caſe, make oath to that fact, the defender muſt be obliged to pay the ſtipulated value.

" The Lords refuſed the bill of advocation." W. J.

Act. Lockhart. Alt. *Hugh Dalrymple.*

N° XIII. 16th *February* 1757.

THOMAS HAMILTON of FALA,

AGAINST

The VISCOUNTESS of OXFURD.

If an heir of entail in poſſeſſion is intitled to cut trees, though the value of them is offered by the next heir?

UPon ſome differences betwixt the Viſcounteſs of *Oxfurd*, then eighty years of age, and *Thomas Hamilton* of *Fala*, next heir of entail to her Ladyſhip in the eſtate of *Oxfurd*, ſhe advertiſed a ſale of all the planted timber round the manſion-houſe, and upon the eſtate.

Mr *Hamilton* preſented a bill of ſuſpenſion. Her Ladyſhip did not alledge the plantations leſſened the yearly value of the ground.

She did not alledge ſhe had any diſlike, in point of taſte, to the plantations.

She did not alledge ſhe was to be a gainer by forcing on the ſale; for Mr *Hamilton* made offer of the price of the timber, provided ſhe would allow it to remain uncut.

Pleaded for the Viſcounteſs, She was not debarred by the entail from cutting the plantations; and as entails admit of no latitude of interpretation, ſhe was at liberty to do whatever ſhe was not debarred from doing.

Anſwered for Mr *Hamilton*, A diſtinction is to be made betwixt the end of a tailzie, and the means of ſupporting it. The end is, the preſervation of a family; the means are, prohibitions on the heir to alienate, and bars upon the creditors to attach: the end is the object of favour in law; the other the object of disfavour: the latter, for that reaſon, has always had a literal interpretation; but, for the ſame reaſon, the former ſhould have a liberal one.

Another diſtinction is to be made betwixt the intereſts of tenants in tail competing with creditors, and the intereſts of tenants in tail competing with the intereſts of after-heirs. In the firſt caſe, the entail is ſtrictly interpreted, ſo as to be beneficial to the creditor; in the other caſe, it is fairly and benignly interpreted, ſo as to be beneficial to the after-heir, and to the will of the entailer. Thus tailzies, without being recorded, have frequently been found good againſt an heir of entail in poſſeſſion, though not againſt creditors; and a prohibition to alter the entail, will bar the tenant in tail from altering it, though it will not bar a creditor from attaching it.

And therefore, when a tenant in tail does a thing to hurt the after-

heir,

heir, from a deſire of diſappointing the entail, there the law, in favour to the will of the entailer, ought to interpoſe.

" The Lords refuſed the bill of ſuſpenſion." J. D.

For ſuſpender, *J. Dalrymple, And. Pringle.* Alt. *J. Craigie, Lockhart, Ferguſon.*

N° XIV. 18th *February* 1757.

CORPORATION of HAMMERMEN in *Glaſgow*,

AGAINST

JAMES DUNLOP, and others, MERCHANTS there.

Whether, notwithſtanding the excluſive privileges of corporations, merchants are intitled, by entering into copartnery with particular freemen, and employing their own ſtock, to furniſh themſelves with goods for exportation?

THE blackſmiths, ſaddlers, and others profeſſing the hammerman-trade in *Glaſgow*, were erected into an incorporation, by ſeal of cauſe, in 1536, with excluſive privileges; and, among others, that none ſhall ſet up a booth to work in the borough till he be made a freeman, and undergo a trial; and this incorporation has immemorially exerciſed this privilege.

James Dunlop, and others, merchants in *Glaſgow*, entered into copartnery, purpoſing, upon their own ſtock and credit, to carry on the manufactory of making ſaddles, principally for exportation. They aſſumed as partners three perſons who were freemen of the incorporation; and they ſet up ſhop in their name.

The incorporation brought an action againſt them, *concluding*, That the *three ſaddlers* ſhould be diſcharged *to pack and peel with unfreemen*, and the *merchants* prohibited to *work* in the buſineſs appropriated to the incorporation.

Pleaded for the defenders, 1*mo*, The three perſons in whoſe name this manufactory is carried on, are freemen of the incorporation, and therefore intitled to carry on this trade; nor is the incorporation intitled to inquire who are their copartners in it, or by what ſtock or credit they are enabled to carry it on.

2*do*, The excluſive privileges competent to incorporations in royal boroughs, do not intitle them to exclude merchant-burgeſſes freemen of theſe boroughs, and as ſuch by law intitled to the privilege of foreign trade, from manufacturing by themſelves, or others, ſuch commodities as they have occaſion to export to foreign parts. They can only prohibit the making ſaddles, *&c.* for ſale within the borough. And in ſupport of this, it was further *argued*, That every inhabitant could import from *London*, or elſewhere, in the courſe of foreign trade, even for ſale within borough, however prejudicial it may be to the intereſt of theſe incorporations: That every inn-keeper may bake, brew, or ſlaughter meat for the uſe of his inn by his own ſervants, though both he and they be unfreemen. So was found in the caſe of *Robert Tennent* in

in *Glaſgow*. And upon the ſame principles, a merchant fitting out a ſhip for a foreign voyage, may bake bread for victualling her, as he only bakes in order to carry on a foreign trade, to which he is intitled, excluſive of that incorporation of bakers. In like manner, the merchant, who has a right to export goods to foreign markets, has a right to provide himſelf with theſe in the moſt beneficial way; in the ſame manner as one exporting a parcel of ſuits of cloaths, is under no neceſſity of employing the incorporation of tailors to make them.

The argument chiefly inſiſted on for the incorporation, That none but freemen can work within borough, is attended with abſurdities, and many inconveniencies. According to it, no gentleman within borough could employ his own ſervant to ſhave him, or to drive a nail within his own houſe. A freeman-maſon is employed to build a houſe; he cannot employ unfreemen as labourers, to do the drudgery. This has never been imagined. Univerſal practice has ſhown, that the privilege of theſe incorporations cannot be carried ſo great a length; and therefore this general propoſition, That none but freemen can work within borough, falls to the ground. Beſides, the matter now in diſpute received a ſolemn determination very lately, in the caſe of the coopers of *Perth*, where it was found, that merchants were intitled to employ their own ſervants, though unfreemen, to make barrels, which were neceſſary for packing ſalmon for exportation.

Anſwered for the incorporation: To the firſt, It is not competent to freemen to cover the goods of unfreemen, by entering into copartneries, and carrying on the trade of the incorporation, with the effects, and for the profit and behoof of theſe unfree partners, who had no title to deal in the trade. This is againſt the principles upon which incorporations are eſtabliſhed; it is contrary to the oath taken by the freemen of this and every other incorporation at their admiſſion, That they ſhall not *pack or peel with unfreemen*, nor *cover unfreemens goods*; and if it is allowed, it will reſolve into a total extinction of the privileges of incorporations.

To the ſecond, By every charter or ſeal of cauſe, and particularly by thoſe granted to this incorporation, the craft has the excluſive right of carrying on their trade within borough; and immemorial uſage has confirmed theſe charters; and this is now become a part of the conſuetudinary law of this country, which cannot be altered. Artificers living without borough, are at full liberty to work to the inhabitants, and to bring in their work, and expoſe it to open ſale on market-days: therefore, if incorporations cannot hinder unfreemen to work within borough, they can hinder nothing; there is an end to all their privileges, and they muſt bear the burdens laid on incorporations, without reaping any benefit from them. If merchants may employ any number of unfreemen, upon pretence of ſupplying their foreign trade, it will be an eaſy tranſition to ſend their goods to market, and it will be next to impoſſible to detect them. When a number of unfreemen keep open ſhops in town, carrying on extenſive manufactories, how is it poſſible to diſcover, whether the goods brought to market are made by them or by freemen? or whether the inhabitants beſpeak what they want from the one or the other, when they live together in the ſame town, with their houſes adjoining to one another? This would diſappoint the undiſputed rights of an incorporation: and it is much the

ſame,

ſame, whether a privilege be directly aboliſhed, or reduced to ſuch circumſtances as that it cannot be maintained.

The right to foreign trade is a vain pretence for this incroachment. Nothing can be more different than the profit which a merchant is to make by foreign trade, and the profit the artificer makes from his work, and the dexterity he has attained in it.

Every ſubject has a natural right to make any manufacture that is neceſſary for his own uſe: but it does not follow, that he may employ unfreemen for that purpoſe; or that a merchant may make for exportation.

The caſe of the coopers of *Perth* does not apply. There the fiſhing-company was allowed to make barrels by their own ſervants for tranſporting their fiſh; for the ſame reaſon, that a merchant would be allowed to put up his goods in boxes, or in packs, or wrappers, without ſending for the wrights to nail them, or the tailors to ſew them. Theſe were conſidered as incidents to foreign trade, but are very different from a whole manufacture; which is here ſought to be ingroſſed. The caſe of *Tennent* is rather on this ſide of the argument: The court allowed him to make malt for the ale and ſpirits conſumed in his houſe; but they found he could not make malt to be diſtilled into ſpirits, and ſold in groſs abroad.

" The Lords found, That the defenders, as merchants, may make " ſaddles and horſe-furniture for their own exportation; but found, " That they cannot make ſaddles and horſe-furniture by their " foremen, although entered freemen in the incorporation, for " ſale in the town of *Glaſgow*." W. S.

Act. *A. Pringle, Ferguſon.* Alt. *Lockhart.* Clerk, *Home.*

N. B. A ſimilar judgment was given between the *Cordiners* of *Glaſgow* and the ſame defenders.

N° XV. 27th *February* 1757.

FRANCIS CHARTERIS of *Amiſfield*, Eſq; and others, PROPRIETORS OF LAND within the ſhire of *Berwick*,

AGAINST

Sir ROBERT PRINGLE of *Stitchill*, and others, JUSTICES OF PEACE and COMMISSIONERS OF SUPPLY of the ſaid ſhire.

Whether particular members of a public meeting can be called ſeverally to anſwer for the application of public money by the meeting?

THE defenders, at two general meetings, as juſtices of peace and commiſſioners of ſupply, had ordered, That two highways in the county ſhould be repaired in preference to the reſt; and had fixed a compoſition to be paid in money, in caſe the labouring men ſhould fail to attend at the reparation of theſe highways; and, becauſe they

ſuſpected that ſome oppoſition would be made to their proceedings, had come to the following reſolution, *viz.* " To impower a committee " to name one or more proper agents at *Edinburgh*, for defending and " diſcuſſing any bills of advocation or ſuſpenſion that might happen " to be offered againſt the proceedings of the meeting, or thoſe acting " under their authority; and to impower the committee to draw upon " the collector of ſupply for the neceſſary ſums, to be paid out of the " highway and bridge money in his hands." In conſequence of this reſolution, the expences of a law-ſuit againſt ſome of the inhabitants of the county, who had refuſed to comply with the orders of the commiſſioners of ſupply, were paid by the collector; and this payment was approved of unanimouſly in an after-meeting of the commiſſioners. The purſuers, who had been averſe to their whole proceedings, executed a ſummons of declarator and repetition, againſt the commiſſioners, of the following purport: " That the expending the highway and " bridge money in a law-ſuit was illegal; and that the defenders, *con-* " *junctly and ſeverally*, ought to be decerned to refund to the collector, " the foreſaid 10*d.* on the *L.* 100; and to employ the ſame as the law " directs. The ſummons alſo concluded againſt the defenders, con- " junctly and ſeverally, for *L.* 500 *Sterling*, *nomine damni*, and for ex- " pences of the proceſs."

The defenders *pleaded* No proceſs; for that all parties having intereſt were not called, as the Earls of *Haddington* and *Marchmont*, and Mr *Alexander Hume-Campbell*, were not ſummoned in the action of declarator and repetition, although all three were preſent at the *Michaelmas* meeting where it was ſaid the public money was ordered to be unlawfully employed: That it could not be pretended, that any two of the defenders might have been purſued conjunctly and ſeverally, to refund the money applied by the whole number, or conjunctly and ſeverally to make payment of the damages occaſioned by the fault of the whole number; and if certain of the defenders could not have been ſo purſued, it was impoſſible to inſiſt againſt any fewer than the complete number of ſuppoſed delinquents.

Anſwered for the purſuers, 1*mo*, That this defence of *No proceſs* came too late, after peremptory defences had been given in; and, according to the ſtated practice of the court, could not now be taken up. 2*do*, That the purſuers only inſiſted againſt the defenders *ſeverally* for their reſpective proportions of the money drawn from the collector, and did not contend, that any one was liable for the whole; and therefore that the action was competent againſt each of them, without calling the reſt.

" The Lords ſuſtained proceſs againſt ſuch as were called, without " prejudice to the purſuers afterwards calling the reſt; but ap- " pointed the libel to be amended, and the word *conjunctly* to be " ſtruck out." W. J.

Act. *Montgomery*. Alt. Sir *David Dalrymple*. Repo ter, Lord *Auchinleck*.

N. B. It was afterwards found, That the money was properly expended; and the defenders were aſſoilzied.

N° XVI.

N° XVI. 27th *February* 1757.

ANDREW WALKER,

AGAINST

JOHN FALCONER.

Action ſuſtained for the price of prohibited goods ſent on commiſſion.

John Falconer merchant in *Nairn*, commiſſioned from *James Jamieſon* merchant in *Gottenburg*, a quantity of teas; which having been ſhipped by *Jamieſon* on board a veſſel for *Portſoy*, in terms of the commiſſion, the veſſel was, upon her arrival, ſeized by the cuſtomhouſe-officers, together with all her cargo.

Jamieſon, by his truſtee *Andrew Walker*, brought an action againſt *Falconer*, for payment of the price of the teas.

Pleaded for the defender, By act 12*mo*, *Charles* II. *cap.* 17. teas are prohibited to be imported into *Great Britain*, from *Gottenburg*, or any other place of which they are not the product, or from which they are not uſually firſt ſhipped for tranſportation; the contract therefore between the purſuer and defender, was unlawful, and can afford no action in a court of law. The intention of the parties was to carry on a ſmuggling trade; and Mr *Jamieſon* could not be ignorant how the law ſtood in this reſpect, as he is a native of *Scotland*, and carried on buſineſs here as a merchant for ſome years before he went abroad. It would therefore be improper to ſuſtain action upon this contract, which was entered into directly againſt law. Nor is it enough to ſay, That the ſtatute has inflicted certain penalties upon tranſgreſſion, ſuch as forfeiture of the goods, *&c.*; and that the court has no power to add new penalties. The preſent objection, if ſuſtained, is not adding any penalty upon the purſuer; it is only denying the aid of the law, to render effectual a contract which is reprobated by the law.

Anſwered for the purſuer, The maxim, *Quod lege prohibente fit, eſt ipſo jure nullum*, admits of this general exception, That where the prohibition is inforced with a penalty, and does not enact an expreſs nullity of the tranſaction, the ſole effect of contravention is to incur the penalty. The legiſlature of *Great Britain* has prohibited the importation of certain commodities under particular penalties; but has not yet gone the length of denying action to the foreign merchant who furniſhes ſuch goods upon commiſſion from his correſpondents in this country. Nor would it be proper or expedient, that ſuch a certification were impoſed: for, however faulty or criminal it may be in the ſubjects of this country, to import uncuſtomable goods, this cannot, in juſtice, ſtrike againſt the foreign merchant or factor, whoſe duty it is to anſwer his commiſſion, and furniſh his correſpondent, without inquiring, whether the goods may be lawfully imported into this or the other country. A merchant reſiding abroad, whether a native of this country or not, cannot have acceſs to know, or be informed,

informed, of the different revenue-acts which are from time to time paſſed in *Great Britain:* neither is it his buſineſs to inquire into theſe matters. His commiſſion is at an end how ſoon the goods are ſhipped upon the riſk and peril of the perſon who gave the commiſſion. The importation is the act of the purchaſer; which, however criminal with regard to him, cannot vitiate the antecedent ſale. No trade could be carried on among different nations, if the contrary doctrine were to be eſtabliſhed.

"The Lords repelled the defence." W. J.

Act. Lockhart. *Alt. A. Pringle.*

N° XVII. 27th *February* 1757.

HUGH MACLEOD of *Genies*,

AGAINST

HENRY ALLAN writer.

If the cautioner of a forfeited perſon, notwithſtanding the veſting act, is liable to the creditor for the expence of diligence?

UPon the 18th *November* 1743, Lord *Balmerino* and *Henry Allan* became bound, conjunctly and ſeverally, to *Hugh Macleod*, for the ſum of 2000 merks.

The eſtate of *Balmerino* was afterwards forfeited to the crown.

Hugh Macleod entered a claim in terms of the veſting act; which was ſuſtained to the extent of the principal ſum and annualrents only, in regard no expences were conſidered as due by the crown in terms of that act.

Hugh Macleod brought an action againſt *Henry Allan*, for the expence he had laid out in the court of ſeſſion for aſcertaining his claim, and afterwards, in exchequer, at receiving payment, amounting to *L.* 16, 6*s.*

Henry Allan objected to this claim, and *argued*, That he was only cautioner for Lord *Balmerino*, as was proved by a bond of relief: That the expences claimed are cut off by act of parliament; and therefore cannot be effectual againſt him; for if he ſhould be decerned to pay them to the purſuer, he would have relief againſt the crown, having duly entered his claim for ſecuring that relief. And therefore the judgment of the court, upon *Hugh Macleod*'s claim, finding him not intitled to expences from the crown, muſt be conſidered as a judgment, finding alſo that he can have no claim againſt the cautioner.

Anſwered, Although expences were refuſed upon *Macleod*'s claim, it does not follow, that they will be refuſed to *Allan*, when he claims upon his relief: For that in a former caſe, of a debt paid by *Allan* to *Roſs* of *Culroſſie*, it was found, That *Allan* was intitled to relief in terms of his claim, ſo far as he had already paid, or ſhould afterwards, upon diſtreſs, as cautioner, be obliged to pay. —— At any rate, it was optional for the purſuer, to have at firſt demanded his debt from *Allan* inſtead of the crown; in which caſe, the expence now claimed muſt have been laid out by *Allan*, in order to recover his relief out of the forfeited eſtate: and it cannot vary the caſe, that,

out

out of favour to the defender, he firſt endeavoured to recover the debt from the crown, as in place of the principal debtor.

" The Lords found *Henry Allan* liable for the ſum claimed." W. J.

Act. *Swinton.* Alt. *Rae.*

N° XVIII. 2d *March* 1757.

JOHN HAY of *Lawfield*, and others,

AGAINST

The DUKE of ROXBURGH.

Where heritors have poſſeſſed the teinds of their lands by tacks, what rule is to be followed in the valuation? — Whether a deduction muſt be allowed on account of ſea-ware,—*an orchard,—or ſtone incloſure?*

THE Duke of *Roxburgh* had right to the teinds within the prebendary of *Pinkerton*, as patron of that prebendary; and had alſo obtained certain long tacks, now expired, from the prebend.

In the year 1642, the predeceſſors of *John Hay*, and others, whoſe lands lie in that prebendary, entered into an agreement with the patron, by which the patron accepted of a certain annual ſum in full of the teinds of their lands; and, on the other hand, the heritors agreed not to purſue a valuation or ſale of their tithes.

The court having found, that this contract was not binding upon the heritors after the expiration of the tacks of the teinds of that prebendary in the perſon of the then Earl of *Roxburgh*, a proof of the value of the tithes was allowed: at adviſing of which three queſtions occurred, 1*ſt*, Whether the fifth part of the rents, ſtock and teind, ought to be conſidered as the rate of the tithes? 2*dly*, Whether any deduction ſhould be allowed on account of the increaſed rent of the land by the uſe of ſea-ware? 3*dly*, Whether the rent of an orchard ought not to be deducted; and alſo the expence allowed, of incloſing a ſmall field with a ſtone-wall, or the rent of it valued as open field?

The Duke of *Roxburgh inſiſted*, That by the decreet-arbitral and ſtatute 1633, two rules were eſtabliſhed for the rate or valuation of tithes: 1*ſt*, " The fifth part of the conſtant rent which each land payeth of ſtock " and teind, where the ſame are valued jointly;" and, 2*dly*, " Where " the teinds are valued apart and ſeverally, as the ſame is, or ſhall " be valued and proved, deducing the fifth part thereof for the eaſe of " the heritors."

That neither of theſe rules apply to the preſent caſe: for that there is here no joint valuation of ſtock and teind; and neither is the teind valued ſeparately from the ſtock; and therefore the valuation ought to be delayed for ſome time, till the value of the teind can be aſcertained, by ſeparating it from the ſtock; or, if that delay ſhall not be granted, the teind ought to be valued, not at one fifth of the total rent, but at one fourth of it, or at one third of the rent which is payable for the

ſtock: That this rule was followed in the caſe of *Jean Moncrieff* againſt *William Young*, 9th *February* 1667, where, in a queſtion between a lady-tercer, and the heir of her huſband, who had right to the teinds payable out of her terce-lands, the Lords aſcertained one fourth of the total groſs rent as the teind: And in the caſe of Sir *William Hope* againſt creditors of *Balcomie*, 10th *December* 1701, obſerved by *Dalrymple*, where the rent payable by the tenant was only for the ſtock, and the heritor drew the teind; and the queſtion was, What deduction ſhould be made for the teind in ſettling the rental in a judicial ſale of the lands? the Lords eſtimated the teind to a fourth of the whole; that is, for every three bolls payable by the tenant for the ſtock, they added a fourth for the drawn teind; and ordered the rental to be framed accordingly.

Anſwered, The teinds in this caſe, are clearly valued jointly with the ſtock, and are to be aſcertained by the rule expreſſed in the ſtatute in that caſe, *viz.* " At the fifth part of the conſtant rent which each land " payeth in ſtock and teind;" and the other rule, of proving the ſeparate value of the teind, cannot take place here. In the caſe of Sir *Robert Gordon* againſt *Dunbar* of *Newton*, in the year 1744, the court refuſed to delay the valuation till the amount of the teinds ſhould be aſcertained by drawing the *ipſa corpora*, although in that caſe *Dunbar* had been in uſe, till within a few years of the valuation, when Sir *Robert* laid down his grounds into graſs, to draw the teinds *ipſa corpora*, but without keeping an exact account.

The fourth part of the ſtock alone has, in ſome caſes, out of neceſſity, been held to be the rate of the teind, *viz.* where the teinds had not been poſſeſſed jointly with the ſtock, but had been drawn *ipſa corpora*, and the titular, from negligence, or other cauſes, had not kept an exact account. In theſe caſes, the ſtock and teind could not be valued jointly, not having been poſſeſſed jointly; neither could the drawn teind be ſeparately proved; and therefore the method followed was, to take a fourth part of the rent of the ſtock as the teind, reckoning that to be nearly equivalent to one fifth of the rent of ſtock and teind jointly. This was the rule followed in the caſe of *Dunbar* of *Newton*, againſt Sir *Robert Gordon*; but the Duke in this caſe demands, that the one fourth of the rent of ſtock and teind ſhould be taken, which is a great deal higher than one fourth of the rent of the ſtock alone.

The deciſion in the caſe of *Moncrieff* againſt *Newton* did not relate to the valuation and ſale of teinds upon the act of parliament, but to what the heir ſhould draw as teind from the lady-tercer of his lands; and the other caſe of Sir *William Hope* related only to a rental in a judicial ſale.

With reſpect to the deduction for *ſea-ware*, it was *contended* for the Duke, That though the tenants depone, that they would not pay above *two thirds* of the preſent rent if they had not the advantage of the ſea-ware; yet this can give no claim for a deduction: for that here the heritor is at no expence; he gets his rent from his tenants without any obligation upon him to furniſh them ſea-ware; neither do the tenants themſelves pay any thing for it; and therefore this does not fall under the caſe of expenſive improvements made by an heritor, or the caſe of manures purchaſed from third parties. Beſides, this deduction has, in many caſes, been refuſed; 18th *February* 1719, *Orrok* againſt the

the officers of ſtate; 20th *February* 1723, *Fraſer contra* Lord *Salton*; 5th *December* 1733, *Craigie contra* Sir *John Anſtruther*; where a deduction was alſo refuſed on account of *lime*; and a caſe was there referred to in ſupport of the ſame doctrine, as to lime, Colonel *John Murray* of *Pilmore contra* Lord *Blantyre*. Theſe are the lateſt caſes. It is true, that, in *December* 1698, in the caſe of *Heriot*'s hoſpital, a deduction was given on account of *dung*; and the ſame judgment was repeated in the caſe of Mr *Patrick Middleton*, *December* 1713. But in a much later caſe, the Duke of *Buccleugh* againſt the heritors of *Dalkeith*, a deduction on account of dung was refuſed, though purchaſed from the inhabitants of *Dalkeith*.

Anſwered, The court has been in uſe to give deductions to heritors on account of induſtrial and coſtly improvements; and in the ſeveral caſes of *Glen contra Diſhingtoun*, *February* 3. 1714; *Patrick Middleton contra* miniſter of *Weſt-kirk*, 2d *December* 1713; and *Heriot*'s hoſpital, 28th *December* 1698, a deduction was given to the heritors on account of the increaſe of the rent ariſing from the accidental advantage of getting dung from the neighbouring boroughs. And with reſpect to ſea-ware; the heritors of *Weſt-barns*, in this very pariſh, in a valuation againſt the Duke of *Roxburgh*'s anceſtors, got a deduction upon account of the ſea-ware. The like deciſion was given, 6th *February* 1709, *Scot contra Hadderwick*; and, 21ſt *July* 1714, *Campbell* and other heritors of *Byrehills:* and, in this caſe, though the tenants do not purchaſe the ſea-ware, yet they are at a great expence in keeping men and horſes for carrying it from the ſhore to their lands: beſides, the Duke pretends right to the links lying between the purſuer's lands and the ſea-ſhore, and has threatened to debar the tenants from the liberty of carrying away the ſea-ware.

With reſpect to the deduction claimed for the orchard, the Duke *contended*, That if a deduction on this account were to be allowed, large tracts of corn-land might be converted into an orchard, by planting a few fruit-trees, in order to avoid tithes. 2*dly*, That the rent of this orchard was formerly *L.* 6 *Sterling*, and the rent of a ſmall incloſed field adjoining was *L.* 4 : 3 : 4; that both are now ſet at *L.* 13; which increaſe of rent muſt be conſidered as wholly on account of the incloſure.

Anſwered, The orchard, conſiſting of two acres, has been always the orchard of the manſion-houſe. It has been walled in, and planted with fruit-trees, paſt memory. Theſe walls have been lately repaired at a great expence, and new trees planted. Orchards or gardens are not teindable ſubjects, as they neither produce parſonage nor vicarage tithes. This was decided 10th *June* 1709, Sir *Walter Riddel contra* the Duke of *Roxburgh*, where a dovecote and fruit-yard were found not teindable. And in the caſe of the miniſter of *Kirkurd contra Lawſon*, *anno* 1730, the rent of a manſion-houſe and yard was deducted from the rental.

The little incloſure of about three acres is fenced by a ſtone wall, and the expence of incloſing it muſt either be allowed; or, if not, the rent of it cannot be rated higher than the open ground contiguous, *viz.* at about 10 *s. per* acre, ſo as the remaining rent may be aſcribed to the orchard. At any rate, the late increaſe of the rent muſt be proportioned between the orchard and that incloſure, reckoning the preſent

rent

rent of the orchard at *L.* 7 : 13 : $5\frac{4}{11}$, and of the incloſure at *L.* 5; 6 *s.* $6\frac{8}{11}$ *d.*

" The Lords found, That the fifth part of the rent of the lands of " *Eaſt Barns* payable for ſtock and teind, is to be the rule for li- " quidating the teind, without any deduction on account of ſea- " ware; without prejudice to the heritors, if the rentals of the " lands ſhall be diminiſhed by the failure of the ſea-ware, to bring " an action, as accords; ſuſtained the deduction claimed for the " orchard; and found, that the additional rent is to be divided " between the ſame and the little incloſure, in proportion to the " former rent they ſeverally paid." W. J.

For the Duke, *Lockhart.* Alt. *And. Pringle, Ferguſon.*

N° XIX. 3d *March* 1757.

KIRK-SESSION of INVERESK,

AGAINST

KIRK-SESSION of TRANENT.

Whether the maintenance of poor is a burden upon the pariſh of their birth, or of their laſt three years reſidence?

David Butler reſided ſeveral years in the pariſh of *Invereſk*, as a day-labourer, during which time a daughter, *Jean Butler*, was born to him. After his death, his wife and daughter removed to the pariſh of *Tranent*; where they lived, without charity, for more than three years. After the mother's death, the child became an object of charity; and a queſtion aroſe, Whether the pariſh of *Invereſk*, where ſhe was born, or the pariſh of *Tranent*, where ſhe had reſided more than three years, was bound to maintain her?

Argued for the pariſh of *Invereſk*, That by the *act* 18. *parl.* 1672, it is declared, " That exact liſts ſhall be made in each pariſh, condeſcend- " ing upon the age and condition of poor perſons; if they be able or " unable to work, by reaſon of age, infirmity, or diſeaſe; *and where* " *they were born, and in what pariſhes they have moſt haunted during the* " *laſt three years.*"

And thus it was found, 5th *June* 1745, pariſh of *Dunſe contra* the pariſh of *Edrom*, " That the pariſh in which perſons indigent, or be- " coming indigent, have reſided during the immediate three years " preceding their application for charity, are bound to ſubſiſt and ali- " ment ſuch indigent and poor perſons."

Anſwered, By *act* 22. *parl.* 1535, the place of nativity is made the only rule with reſpect to the maintenance of poor; which is again repeated, *act* 25. *parl.* 1551.—As the place of nativity might not always be known, it was provided by *act* 74. *parl.* 1579, " That all " poor people repair to the pariſh where they were born, or had their " moſt common reſort or reſidence the laſt ſeven years." This is more particularly explained by *act* 16. *parl.* 1663, where the burden is impoſed

poſed upon " the pariſhes where ſuch vagabonds or idle perſons, who " ſhall be found begging, were born; or in caſe the place of their nati- " vity be not known, the pariſhes where they have had any reſidence, " haunt, or moſt reſort, for the ſpace of three years immediately pre- " ceding their being apprehended."

As by theſe acts, the rule was eſtabliſhed, That the place of birth ſhould be obliged to maintain the poor, and the place of reſidence only, where the other could not be known; ſo the act 18. parl. 1672, will not be underſtood to have introduced any alteration, when it declares, " That liſts are to be made up in every pariſh, of the poor per- " ſons, condeſcending upon their age and condition; if they be able, " or unable to work, by reaſon of age; and where they were born; " and in what pariſhes they have moſt haunted during the laſt three " years preceding the uptaking of the liſts."

This is further explained by an act of the privy council, 29th *Auguſt* 1693, ratified in parliament, by which " all beggars, vaga- " bonds, and poor perſons, are ordered to return to the pariſhes where " they were born; and that not being certain, to the pariſh where they " laſt reſided for the ſpace of ſeven years together."

" The Lords found, That the pariſh of *Invereſk* is bound to maintain " the child, in reſpect of its birth; and remitted to the Lord Ordi- " nary to proceed accordingly." W. J.

For the pariſh of *Tranent*, *Garden*. Alt. Sir *David Dalrymple*. Reporter, Juſtice-Clerk. Clerk, *Home*.

N° XX. 4th *March* 1757.

ELISABETH MAULE, widow of THOMAS KER,

AGAINST

JAMES GRAHAM of *Methie*.

Reparation of damage ariſing from the management of a negotiorum geſtor.

THomas Ker farmer at *Ovenſtoun*, died, leaving *Helen Fotheringham* his widow, and *Thomas Ker* his ſon, a minor, in poſſeſſion of his farm and ſtocking.—The widow and *James Graham* of *Methie* were choſen two of the ſon's curators, and acted accordingly during his minority.

In the 1746, while *Thomas Ker* was yet under age, he, with conſent of his curators, intermarried with *Eliſabeth Maule*; and, by contract, became bound to provide her in a jointure of 400 merks *Scots*.

In *December* 1747, *Thomas Ker* having come of age, diſcharged his curators of their intromiſſions: but as he was of ſo weak a mind as to be totally incapable of all buſineſs, and particularly of judging as to the import and propriety of deeds which he ſigned, when deſired by his friends; ſo his mother continued to manage the farm after his majority till her death, in the 1749; and Mr *Graham* of *Methie* took the charge of his other affairs.

Upon the death of the mother, the farm was given up, and the

ſtocking rouped. The proceeds were received by Mr *Graham*; who accounted for the ſame, and obtained a diſcharge from *Thomas Ker*, at the ſight of his uncle *John Ker*, who had alſo been one of his curators. About the ſame time, *Thomas* executed a bond of interdiction of himſelf to the ſaid *James Graham* and *John Ker*; but as he had no heritable eſtate, it was not uſed nor recorded. Mr *Graham*, without any expreſs factory or commiſſion, continued in the management of *Thomas Ker*'s affairs.

The only funds belonging to *Thomas Ker*, beſides the produce of the ſtocking, were, a bond-debt of 1000 merks due by Sir *Patrick Murray*, which Mr *Graham* compounded along with Sir *Patrick*'s creditors; and another bond-debt of 8500 merks due Mr *Fotheringham* of *Pourie*, who at the ſame time was due to Mr *Graham* himſelf, by bond, a ſum of 22,000 merks. In 1751, *Pourie* having intimated his reſolution to pay up both his bonds, unleſs the intereſt was reſtricted to 4, *per cent.* Mr *Graham* received payment of both debts at *Martinmas* 1751, and delivered to *Pourie Thomas Ker*'s diſcharge for his bond, witneſſed by *John Ker* his uncle.

Mr *Graham* having thus in his hands the funds of *Thomas Ker*, did, on the 29th *November* 1751, lend out the ſame, to the amount of 10,700 merks, to *Thomas Kinnear*, on his perſonal bond, payable at *Martinmas* 1752: and upon *Kinnear*'s owning his ſubſcription to *John Ker*, ſome months after the date of the bond, *John Ker* ſubſcribed the ſame as an inſtrumentary witneſs; but was not preſent at the tranſaction itſelf.

Thomas Kinnear had been bred a weaver, and reſided in the cottar-town of *Finlarg*; where, after the 1738, he kept a ſhop for retail of ſugars, ſoap, tea, *&c.*—He alſo purchaſed a ſmall feu, and built a houſe upon it. But his credit was chiefly from the *Britiſh Linen Company*, and other dealers in linen; for whom he was employed to purchaſe yarn, and to weave part of it, to a conſiderable extent.—It did not appear, indeed, that any other perſon had ever lent him above 1000 merks on a laſting ſecurity; and he was diſcovered to have been deeply engaged as a partner with his ſon *John Kinnear*, who carried on a ſmuggling or contraband trade.

Thomas Ker died in *February* 1752, leaving *Eliſabeth Maule*, his widow, and two infant daughters. In *July* thereafter *John Ker*, acting as tutor of law to theſe infants, received payment from *Kinnear* of part of the intereſt then due on his bond; and, about the ſame time, *Eliſabeth Maule* and the ſaid *John Ker* granted a factory to *Iſaac Jolly* for receiving the intereſt of all ſums due to the widow or children; and under that factory *Jolly* received from *Kinnear* payment of the intereſt of his debt due in the years 1752 and 1753, and paid over the ſame for the uſes of the widow and children.

In the beginning of the 1754, *Thomas Kinnear* became inſolvent.

Eliſabeth Maule being decerned executrix to her deceaſed huſband, as creditor in the proviſions of her marriage-contract, brought an action againſt the ſaid *James Graham* of *Methie*, and *John Ker*, jointly, for payment of the ſum contained in *Kinnear*'s bond. She afterwards paſſed from her concluſion againſt *John Ker*, and inſiſted againſt Mr *Graham* ſingly, on this ground, That *Thomas Ker* having been under a natural incapacity, Mr *Graham* took upon him the management and direction

of

of all his affairs as a *negotiorum geſtor*; and having uplifted all the funds belonging to him, when ſettled on good ſecurity, and lent out the whole to *Thomas Kinnear* on his perſonal bond, payable at a diſtant term, when *Kinnear* was in ſuch a ſituation as no prudent perſon would have intruſted him, for any length of time, with ſuch a large ſum, Mr *Graham* was liable, in law and equity, to relieve *Thomas Ker*'s family of the conſequences of *Kinnear*'s inſolvency, by paying the bond, on obtaining an aſſignment to it.

Pleaded for the defender, 1*mo*, *Thomas Ker*, though a weak man, was under no legal incapacity. The lending the money to *Kinnear* was conſequently his own act; and the defender, from motives of humanity, conſidering, that his ſituation required the interpoſition of friends, only acted the part of a friend, and had no profit thereby, nor any ill deſign or fraudulent intention in adviſing that loan. 2*do*, None of the characters of *negotiorum geſtor*, of mandatary, or tutor, are applicable to the defender; and therefore he muſt be proved guilty of a fraud or groſs negligence, before he can be made liable; which cannot be here done, as *Kinnear*'s circumſtances ſeemed then good, and his credit fair. 3*tio*, *John Ker*, the uncle of *Thomas*, under the character of tutor for his children, and the purſuer herſelf, having reſted on *Kinnear*'s ſecurity for two years after *Thomas Ker*'s death, and having joined in naming a factor, who, by their authority, uplifted from him thoſe two years intereſt, the defender was thereby diſcharged of any conſequences of *Kinnear*'s failure, even ſuppoſing him to have been originally anſwerable, all demand or challenge being barred by that homologation.

Anſwered for the purſuer, 1*ſt*, Though *Thomas Ker* was not under a legal, yet he was confeſſedly under a natural incapacity of managing his affairs, and cannot be ſaid to have received advice from the defender, or to have authoriſed the defender to act for him. A perſon who voluntarily, and without any authority, takes the management of another's affairs, makes himſelf reſponſible for all the conſequences. He excludes all others from acting; and is therefore bound to beſtow the greateſt care and attention, inſomuch that if even mere negligence appears, without ill deſign, he who acts ſo officiouſly is bound to repair every loſs. 2*do*, The defender was liable in the ſtricteſt diligence, as a *negotiorum geſtor*, which is defined, *Is qui abſentis, vel ignorantis, negotia gerit ſine mandato. Thomas Ker*, though corporally preſent, was in mind and underſtanding abſent, and ignorant as to this loan; which therefore was not the act and deed of him, but of the defender; who is liable for the conſequences, *ex quaſi contractu*, ſince it appears any other perſon more diligent would have managed the matter to greater advantage. Here the circumſtances even indicate fraud or colluſion, as the defender lent none of his own money to *Kinnear*, but of himſelf put the whole fortune of a helpleſs family into his hands, and ſecured him in poſſeſſion of it for an uncommon time, by taking the bond payable at the diſtance of a year from its date; and his procuring *John Ker*'s ſubſcription, at a diſtance of time, as a third inſtrumentary witneſs, was in order to give ſome ſanction to his proceedings. But, at any rate, the defender was groſsly negligent and culpable, in ſinking the whole ſtock of this family, (which was till then well ſecured), in the hands of a labouring manufacturer, imbarked in the pernicious practice of ſmuggling, and with whom he had been long acquainted.

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The credit which *Kinnear* had was only from merchants and dealers in linen, reſiding at a diſtance, who trade for profit, and are obliged to venture that they may gain. They did not (like the defender) truſt him for any conſiderable time; but cauſed him make his returns always in a few days or weeks. And, *3tio*, It does not appear that *John Ker* was a party to this tranſaction, or approved of it; but ſuppoſing he did, that cannot prejudice the purſuer.

The purſuer, kept ignorant of this tranſaction, and of all the other buſineſs of her family, was obliged to accept of the intereſt of this money for their immediate ſubſiſtence.—She gave a general power for receiving monies due to her huſband, without knowing who was bound in *Kinnear*'s bond; which having been neceſſary, cannot be conſtrued into an approbation of the defender's conduct; and neither this, nor any other act of the purſuer, can diſappoint the juſt claim of her infant children, for whom, as well as for herſelf, ſhe is now proſecuting.

" The Lords found *James Graham* of *Methie* liable to the purſuer in " the ſum of 10,700 merks lent to *Thomas Kinnear*, and annual- " rents thereof reſting ſince *Martinmas* 1753, upon her making a " valid conveyance to him of the bond for the above ſum grant- " ed by *Thomas Kinnear* to *Thomas Ker*; without prejudice to the " ſaid *James Graham*'s inſiſting againſt *John Ker*, or any other " parties, as accords." D. R.

Act. *Rae, Wedderburn, Lockhart.* Alt. *Advocatus, Geo. Brown.*

N° XXI. 8th *March* 1757.

ANDREW PLUMMER,

AGAINST

His TUTORS and NEAREST RELATIONS by the FATHER's ſide.

Tutors authoriſed to ſell an heritable ſubject for the utility of the pupil, though not neceſſary on account of debts.

FOur phyſicians in *Edinburgh* had originally joined in erecting an elaboratory, for preparing and ſelling chymical preparations, and a theatre for the accommodation of ſtudents attending their lectures upon chymiſtry. All their ſhares came at length into the perſon of one of the four, Dr *Plummer*; who continued the project alone, and died in very good circumſtances.

The magiſtrates of *Edinburgh*, deſirous that the project ſhould continue in the perſon of a phyſician, offered to the tutors of the Doctor's ſon an unexceptionable price for the elaboratory.

It was plain, that the work could not be continued in the perſon of the infant; that the buildings of the elaboratory could not profitably be turned to any other uſe; and that the bargain was highly beneficial for the infant: for which reaſon, he and his tutors applied, by ſummary petition, to the court, to be authoriſed to make the ſale; on this ground, That the

egeſtas

egeſtas of a pupil was not the only ground for the interpoſition of the court to authoriſe a ſale, but that an *utility*, founded on a neceſſity like the preſent, was likewiſe a ground for it; for which the doctrine of the Civil law was quoted, contained in *Voet*, *tit. De rebus eorum qui ſub tutelæ*, &c. § 8.

The Lords thought they could not authoriſe the ſale in this ſummary form, but that an action ſhould be raiſed for that purpoſe; which accordingly was done, by the pupil and tutors, againſt his neareſt relations: And then

"The Lords found, That it was for the utility of the pupil to ſell "the elaboratory; and therefore authoriſed the tutors to ſell it."

J. D.

Act. J. Dalrymple, And. Pringle.

N° XXII. 9th *March* 1757.

HUGH MACLEOD of *Genies*,

AGAINST

HUGH FRASER of *Lovat*, and his CREDITORS.

A proper wadſetter being diſpoſſeſſed, his claim for the rents is only perſonal, and not real againſt the lands.

John Macinreoch obtained, in the 1630, a wadſet of part of the lands of *Aſſint*, redeemable after nineteen years.

Kenneth Mackenzie, ſecond ſon of Lord *Seafort*, came to have right to the eſtate of *Aſſint*, in virtue of certain adjudications and appriſings; and in the year 1676, the wadſetter was forcibly turned out of poſſeſſion of the wadſet-lands, and *Kenneth Mackenzie* immediately entered to the poſſeſſion.

In the 1730, the heir of the wadſetter obtained a decree of preference, as to the mails and duties, againſt the reverſer *Kenneth Mackenzie*; in conſequence of which ſhe recovered the poſſeſſion of the wadſet-lands in the year 1736, and then brought an action for the rents and profits of the lands during the period ſhe and her predeceſſors had been forcibly excluded, *viz.* from the 1676 to 1736, and conveyed her right to *Hugh Macleod*.

The creditors of *Kenneth Mackenzie* brought a ranking and ſale of the eſtate of *Aſſint*. In this proceſs *Hugh Macleod* inſiſted to be ranked as a preferable creditor, not only as to the property of the wadſet-lands, ſubject to redemption, but alſo for the rents and profits from the 1676 to the 1736.

It was *admitted* by the creditors, That the claim for the rents and profits was well founded, as a perſonal debt, againſt *Kenneth Mackenzie*, the proprietor of *Aſſint*; but they *denied*, that it was a preferable debt affecting the wadſet-lands, in a competition with them.

For *Hugh Macleod* it was *argued*, That though the claim for the bygone rents of the wadſet-lands is a perſonal debt; yet he ought to be found intitled to retention of the wadſet-lands, ſuppoſing an order of

redemption uſed, until payment of theſe bygones.—It was a breach of the contract of wadſet, upon the part of *Kenneth Mackenzie*, to diſpoſſeſs the wadſetter of the lands; and, of conſequence, the wadſetter would have been intitled againſt him, the reverſer, to retain the poſſeſſion after an order of redemption, till the rents from which he was excluded were fully repaid. This defence muſt be equally good againſt the creditors of *Aſſint*, ſince their diligences can only carry the right of reverſion, and they cannot be in a better caſe than the reverſer.

If this wadſet had been improper, the lands could not have been redeemed but upon payment of the intereſt of the wadſet-ſum during the years of excluſion, as well as the principal: and the rents, in the caſe of a proper wadſet, muſt be conſidered in the ſame light with the annualrents in the caſe of an improper wadſet; and therefore muſt be equally ſecured to the wadſetter by a right of retaining the lands.

Anſwered, The claim of a proper wadſetter diſpoſſeſſed of the lands, is good againſt the perſon who diſpoſſeſſed him, and received the rents, whether that violence was committed by the reverſer or by a third party: but in both caſes it is only a perſonal claim; becauſe, by the nature of a proper wadſet-right, the rents are taken in place of the intereſt of the money, and the wadſetter runs all riſks, and has a remedy at law for keeping and recovering poſſeſſion of the rents. The caſe of an improper wadſeter is different: the rents are not taken in place of the intereſt of the money; for the reverſer is bound to uphold them; and therefore the intereſt of the money is a real debt againſt the eſtate, unleſs in ſo far as paid or extinguiſhed by the rents received.

" The Lords adhered to the Lord Ordinary's interlocutor, finding " *Hugh Macleod* preferable as to the property and poſſeſſion of the " wadſet-lands till redemption, ſubject to redemption in terms of " the wadſet-right; but finding, that the intromiſſions had by " the common debtor and his author, the reverſer of the wadſet-" right, with the rents and profits while the wadſetter was kept " out of poſſeſſion, were not *really* ſecured, nor could affect or " burden the clauſe of reverſion in the wadſet-right; and there-" fore that *Hugh Macleod* could only be ranked *ultimo loco* for theſe " rents and profits." W. J.

Act. *Lockhart.*

N° XXIII. 9th *March* 1757.

Captain WILLIAM LIVINGSTON,

AGAINST

FRANCIS Lord NAPIER.

Whether the fee of an eſtate veſts ipſo jure, *without a ſervice, in a* nominatim *ſubſtitute in a tailzie?*

Mary Counteſs of *Callender*, afterwards Counteſs of *Findlater*, in her contract of marriage with Sir *James Livingſton*, her ſecond huſband,

band, was provided to the property of the lands of *Weſtquarter*, failing iſſue of the marriage.

Sir *James* having died without iſſue, Dame *Helen Livingſton*, his niece, was ſerved heir to him, and obtained herſelf infeft upon a precept of *Clare conſtat* from the ſuperior. Theſe titles were made up, in order to enable her to denude of the lands in favour of the Counteſs of *Findlater*, in terms of the above contract of marriage. And accordingly, in 1704, ſhe executed a diſpoſition of the lands to the Counteſs, containing procuratory and precept; but upon this deed no infeftment followed in the perſon of the Counteſs.

In 1705, the Counteſs of *Findlater*, with conſent of her huſband, granted procuratory for reſigning the ſaid lands, " in favour, and for " new infeftment of the ſame to be made and granted to her, and the " ſaid *James* Earl of *Findlater* her huſband, and longeſt liver of them " two, in liferent and conjunct fee, for the Earl's liferent-uſe thereof " allenarly; and to *James Livingſton*, third ſon of *Alexander Livingſton* " of *Bedlormie*, and the heirs-male to be procreate of his body; which " failing, to his other heirs-male whatſoever," *&c.* This procuratory contains the uſual prohibitory, irritant, and reſolutive clauſes, *de non alienando vel contrahendo*, with certain reſerved powers in favour of the Counteſs herſelf: and ſhe thereby " aſſigns and diſpones to the fore- " named perſons, the haill rights, evidents, and ſecurities of the ſaid " lands."

The Counteſs of *Findlater* having died ſoon after the execution of this ſettlement, the ſucceſſion opened to the ſaid *James Livingſton*; who, in 1706, took infeftment upon the precept contained in *Helen Livingſton*'s diſpoſition to the Counteſs. This ſeiſin narrates the tailzie, with the prohibitory and irritant clauſes therein contained.

In 1728, *James Livingſton* obtained a charter from the ſuperior upon the procuratory contained in *Helen Livingſton*'s diſpoſition, and was thereupon infeft; but none of the prohibitive and irritant clauſes were repeated either in the charter, or inſtruments of reſignation and ſeiſin.

Soon after, *James Livingſton* ſold theſe lands to Mr *William Drummond* of *Grange*; who again, in 1734, ſold the ſame to Lord *Napier*, the defender.

James Livingſton died without iſſue; whereupon Captain *William Livingſton*, his immediate younger brother, procured himſelf to be ſerved heir of proviſion and tailzie in general to the Counteſs of *Findlater*, as ſuppoſing the infeftments that had been expede by his brother *James* to be void and null, in regard he had neglected to procure himſelf to be ſerved heir of tailzie and proviſion to the Counteſs; and conſequently, that the perſonal right of the lands ſtill remained *in hereditate jacente* of the Counteſs. And he having taken infeftment upon the precept in *Helen Livingſton*'s diſpoſition to the Counteſs, which, as being ſtill unexecuted, he pretended to carry by the foreſaid general ſervice, he inſiſted in a proceſs of reduction of all the intermediate title-deeds, under which theſe lands were poſſeſſed by the defender.

Objected, That the purſuer has made up his title improperly, by ſerving heir of tailzie in general to the Counteſs of *Findlater*, after ſhe was denuded of the right of the land by the infeftment taken by *James Livingſton:* That he ought to have made up his title by a ſpecial

ſervice

ſervice to *James Livingſton*, the perſon laſt infeft; and until ſuch title is made up, the defender is not obliged to produce his rights, or enter into a diſpute with him.

And, in ſupport of this objection, it was *pleaded* for the defender, That *James Livingſton* was intitled to execute the precept and procuratory in *Helen Livingſton*'s diſpoſition to the Counteſs of *Findlater*, without the neceſſity of a ſervice, by virtue of the ſpecial aſſignment to the writs and evidents, either as joint nominee or inſtitute with the Counteſs, or as *nominatim* ſubſtitute to her. He is not called, in the procuratory granted by the Counteſs, under the character of an heir of tailzie, or heir-ſubſtitute, which might have made a cognition or ſervice neceſſary, to ſhow that the intermediate heirs had failed; but the very ſame words which granted procuratory for reſigning in favour of the Counteſs herſelf, do likewiſe apply to *James Livingſton*, whereby he was conſtituted joint diſponee or inſtitute with her, and muſt regularly have been infeft along with her upon the precept of ſeiſin contained in the charter, if ever her procuratory had been executed: and therefore, as aſſignee to the writs and evidents, he was intitled, after the death of the Counteſs, to execute the procuratory and precept in *Helen Livingſton*'s diſpoſition, in the ſame manner as the Counteſs herſelf could have done. Nor was there any occaſion for a ſervice in his perſon for that purpoſe, as no heirs could intervene between him and the Counteſs, whoſe failure behoved to be cognoſced; more eſpecially where all the right that the Counteſs herſelf had, was but a perſonal diſpoſition; *Stair, lib.* 3. *tit.* 5. § 6. and § 25.; *Bankton, lib.* 3. *tit.* 5. § 88.; *February* 23. 1675, *Lamington contra Muir*; *February* 4. 1630, *Robertſon contra Preſton*. If therefore the fee of theſe lands was properly eſtabliſhed in *James Livingſton*, without a ſervice, the purſuer's ſervice, as heir of tailzie and proviſion to the Counteſs of *Findlater*, is inept, and can never give a title to challenge the rights derived from *James Livingſton*, the perſon laſt veſted in the fee.

Anſwered for the purſuer, The Counteſs of *Findlater*, at the time of her death, was the only fiar and proprietor of theſe lands. The fee ſtill remained with her after the tailzie; and *James Livingſton* is only called to the ſucceſſion upon her death. It is impoſſible, therefore, that ſhe could be denuded of this fee upon her deceaſe, without a ſervice: *Mortuus nunquam ſaſit vivum*. If a property is once veſted, it cannot be tranſmitted, either from the *living* or from the *dead*, but by a document in writ. The ſecurity of our records depends upon the ſtrict obſervance of this rule. A *nominatim* ſubſtitution is allowed to ſupply the place of a confirmation in perſonal bonds; but it will not ſupply the want of a ſervice in land-rights, whether completed by infeftment or not; *Dirleton, p.* 149. *tit. Heirs of proviſion, and, Subſtitute; Dict. Deciſ. vol.* 2. *p.* 367. *tit. Service and confirmation. James Livingſton*, therefore, without being ſerved heir to the Counteſs, had no title to execute either procuratory or precept. He could only take the lands as heir-ſubſtitute to the Counteſs, the proprietor thereof. And it is againſt all the principles of law, to maintain, that an heir-ſubſtitute in lands, though *nominatim*, can be veſted in the eſtate *ipſo jure*, without a ſervice; and conſequently there was nothing in *James Livingſton*'s perſon which could be taken by a ſervice, as he did not connect his title to the fee that was in the Counteſs; and which therefore remained

mained in her *hereditas jacens* until it was tranſmitted to the purſuer by his general ſervice, and is now fully veſted in him by his infeftment.

" The Lords repelled the objection; and found, That the purſuer " had a ſufficient title to force production of all deeds granted by " the Counteſs of *Findlater* or *James Livingſton*." G. C.

Act. *Ferguſon.* Alt. *And. Pringle, Lockhart.* Clerk, *Forbes.*

N° XXIV. 10th *March* 1757.

WILLIAM NAIRNE,

AGAINST

Sir THOMAS NAIRNE.

Whether a remote ſubſtitute can apply ſummarily for the regiſtration of an entail?

UPon the 29th *February* 1704, an entail was executed of the lands of *Dunſinnan* by Sir *William Nairne*.

Upon the 17th *October* 1752, Sir *William* executed a ſecond entail of the ſame eſtate, varying in ſome particulars from the former. Neither of theſe entails were recorded in Sir *William*'s life.

Sir *Thomas* ſucceeded to his father, and ſerved himſelf heir in general.

William Nairne, brother of Sir *Thomas*, a remote ſubſtitute, preſented a petition to the court, craving, That the entail 1704 ſhould be recorded, for his own behoof, and for the behoof of Sir *Thomas*'s children, to whom he was named curator by Sir *William*; and for that purpoſe produced one of the original copies of the entail, which had come into his poſſeſſion in a regular manner.

Sir *Thomas Nairne* objected to this, and *argued*, That a remote ſubſtitute of an entail could not apply in a ſummary manner, by petition, for recording an entail: That ſuch application was only allowed to the maker, or to the heir in poſſeſſion: That a ſubſtitute had no other remedy, but to bring an action againſt the heir in poſſeſſion, to compel him to apply for recording the entail; and if ſuch an action were brought, the heir in poſſeſſion would be allowed to ſtate his defences againſt the recording: That this form of proceeding had been found neceſſary above twenty years ago, in the caſe of *Drummond* of *Carron*, and in the caſe of the tailzie of *Callender:* That it was even a doubt, in point of law, whether an heir in poſſeſſion could be at all compelled to record an entail which had not been completed by regiſtration during the life of the maker; and in this caſe it appeared that Sir *William* had made a ſecond entail in 1752.

" The Lords appointed the entail to be recorded." W. J.

Act. *Nairne.* Atl. *Mackintoſh, Ferguſon.*

N° XXV. 11th *March* 1757.

JAMES BOYLE of *Montgomeryſton*, Eſq; and others, LATE COUNSELLORS of the borough of *Irvine*,

AGAINST

JOHN CUMMING, PROVOST, and others, MAGISTRATES and COUNSELLORS of the ſaid borough.

Whether tradeſmen can be elected counſellors of a borough-royal?

James Boyle of *Montgomeryſton*, and others, who were counſellors of the borough of *Irvine* for the year preceding *Michaelmas* 1756, gave in a petition and complaint to the court, complaining of an undue election of the magiſtrates and council of the ſaid borough, made by Provoſt *Cumming* and others, at *Michaelmas* 1756, upon the following ground, amongſt others.

That, by the ſet of the ſaid borough, recorded in the books of the convention of the royal boroughs in 1708, "the council is to conſiſt "of *fifteen merchants*, including the provoſt, two bailies, dean of "guild, and treaſurer, *and two trades*, making in all ſeventeen:" And that, notwithſtanding this ſet of the borough, *ſix perſons*, *all tradeſmen*, and members of ſeveral incorporations of crafts, had been elected merchant-counſellors at the ſaid *Michaelmas* election.

This article of the complaint was founded upon the act 12. 1466, act 107. 1487, act 80. 1503, and act 52. 1555. From theſe ſtatutes, it was *argued*, That there was an abſolute incompatibility betwixt the character of a merchant and tradeſman; and that they cannot both ſubſiſt in the ſame perſon at one time; and, conſequently, that theſe ſix tradeſmen could not be elected merchant-counſellors; and that this was contrary to the immemorial practice, as well as to the ſet of the borough, and the above-mentioned acts of parliament.

Anſwered for the defenders, 1*mo*, Our ſtatute-law is ſubject to be altered by deſuetude, or contrary cuſtom; and it is certain, that, for many years paſt, craftſmen have been allowed, in this and in all the other boroughs in *Scotland*, not only to import the materials of their ſeveral manufactures, but alſo to export and import all ſort of commodities, without neceſſity of a previous renunciation of their crafts, as required by the above ſtatutes. And if the law is in deſuetude, with reſpect to the incompatibility of being both a merchant and a member of a craft at the ſame time, it muſt certainly be alſo in deſuetude with reſpect to what is only conſequential, *viz.* the privilege of ſuch perſon's being elected into the council as a merchant. 2*do*, The ſtatute of *James* III. above quoted, ordains, That the perſon who is both craftſman and merchant, *ſhall either forbear his merchandiſe*, *or elſe renounce his craft*. Therefore he may forbear or renounce either the one or the other, when objected as a diſqualification againſt him. 3*tio*, Theſe ſix perſons objected to are truly not craftſmen, but merchants; which

which will appear from a particular examination of the ſeveral circumſtances of their trade. And, at any rate, an innocent miſtake, ariſing from former practice in electing any one or two of theſe ſix perſons, not properly qualified, cannot have the effect in law to reduce and vacate the whole election of magiſtrates and counſellors. It can go no further than to make void the particular election of the unqualified perſons. 4*to*, The objection ought to be repelled *in poſſeſſorio*, in regard that, by the practice of the borough, the ſtrict letter of the ſet, founded on by the complainers, has been departed from in a multitude of inſtances preciſely ſimilar to thoſe of the ſix perſons objected to, as appears from a ſearch into the council-records; and therefore, upon the preſent complaint for reducing the election of the defenders, when no ſuch election was made by the complainers as can be ſupported by the judgment of the court, in oppoſition to it, it would be very improper, and grievous to the borough, to throw it into anarchy, till a poll could be obtained; and very unjuſt to ſubject the reſpondents perſonally to the penal conſequences of the complaint, for having done no more than followed the practice of the borough, and the example of thoſe very complainers in many inſtances during their former adminiſtration of the borough. If the practice has been erroneous, it may be corrected in the declaratory action now depending in court at the inſtance of the complainers, allowing the preſent election to ſubſiſt.

Replied for the purſuer, 1*ſt*, By the above ſtatutes, which are agreeable to the original and ſtill ſubſiſting conſtitution of the boroughs, a material diſtinction is introduced between the merchants, or members of the guildry, and craftſmen. It is a miſtake, to ſay, that theſe acts of parliament have gone into deſuetude. The law is ſtill the ſame; although illegal acts do ſometimes paſs unchallenged.

2*dly*, No craftſman can uſe merchandiſe, unleſs he obtains a liberty ſo to do, not only from his craft, to which, at his entry, he became engaged to bear a ſhare of all their burdens and taxations, and from which he could not be releaſed but by their conſent; but alſo from the merchants, upon whoſe peculiar province of merchandiſe he cannot incroach, without their conſent, and being by them, upon renouncing his craft, admitted into the guildry. It would deſtroy the very principles of the borough-laws, if the ſame perſon were allowed to be a craftſman and a merchant at the ſame time, or to aſſume either of theſe characters as beſt ſuited his preſent purpoſe; and would create great confuſion in boroughs, in which the different orders eſtabliſhed by law cannot be confounded without overturning the whole ſyſtem.

3*dly*, The defenders were appointed, in the proceſs of declarator between theſe parties, to confeſs or deny, whether theſe ſix perſons were not actual craftſmen. They have been held as confeſſed, and the term circumduced againſt them; therefore they cannot now be allowed to plead againſt what is thus judicially concluded againſt them. But further, upon examining the circumſtances of each of them, it is evident, that they are properly craftſmen, incorporated with and enjoying all the privileges of their reſpective crafts. And although they may have practiſed merchandiſe by tolerance ſometimes, yet this was an abuſe, and can never juſtify their being choſen as merchant-counſellors, contrary to law and the ſet of the borough. The objection ariſing from their incapacity muſt be fatal to the whole election; becauſe

theſe

theſe ſix tradeſmen, being elected into the new council, made the majority, and had the deciſive voice in all the ſubſequent ſteps of election. If that ſtep was illegal, every thing that was founded upon it muſt fall to the ground.

4*to*, The ſet of the borough is explicit, and makes a peremptory diſtinction betwixt merchant-counſellors and trades-counſellors. Nothing can deſtroy the expreſs terms of the ſet, but an *uniform* contrary uſage. But no ſuch thing can be pretended in this caſe; and the few exceptions ſpecified by the defenders tend only to confirm the general rule. In a period of near fifty years, the defenders have only, after diligent ſearch, been able to ſpecify five tradeſmen elected into the merchant-council, and theſe too at different periods: but the general uſage of the borough has been agreeable to the ſet. There are often illegal proceedings at elections, which paſs unobſerved or unchallenged; but ſo ſoon as ſuch abuſes come to a height, as in the preſent caſe, and are complained of to the court, they ought to be redreſſed, and not allowed to paſs with impunity.

" The Lords found, That the election of ſix tradeſmen as merchant-
" counſellors was contrary to the ſet of the borough; and there-
" fore found the election void and null." G. C.

Act. *A. Pringle.* Alt. *Miller.* Clerk, *Kirkpatrick.*

N. B. This was reverſed in the Houſe of Peers.

N° XXVI. 15th *June* 1757.

Mr JAMES MILLER miniſter of the goſpel at *Hamilton*, purſuer,

AGAINST

ROBERT STORIE tackſman of *Bothwell-Bridge*, defender.

Exemption from toll acquired to the inhabitants of a town by preſcription.

IN the year 1647, the magiſtrates and council of the town of *Hamilton* obtained a grant from the privy council of *Scotland* of certain tolls and cuſtoms, to be levied *upon all paſſengers and goods* paſſing *Bothwell-Bridge*, for the ſpace of three nineteen years, with the burden of repairing and keeping up the ſaid bridge during the continuance of the grant; and, in 1704, obtained a renewal of this grant.

The magiſtrates and council of *Hamilton*, from the time of obtaining the above grants, were in the conſtant uſe of letting the tolls and cuſtoms of *Bothwell-Bridge* to tackſmen for a term of years; and alongſt with the tack, there was delivered to the leſſee a roll or table of the particular cuſtoms he was to levy. None of theſe tacks contained any exemption from payment of this duty in favour of any particular perſons; but the burgeſſes and inhabitants of *Hamilton* had, for time paſt all memory, enjoyed this privilege or exemption for themſelves,

and

and their goods and effects, ſo often as they had occaſion to paſs this bridge.

In 1744, *Robert Storie*, the defender, became tackſman of theſe cuſtoms at a public roup, upon the ſame terms as former tackſmen; and continued for about ten years the exemption to the inhabitants of *Hamilton* from payment of duty at the bridge.

In *June* 1755, the purſuer Mr *Miller* having occaſion to employ a number of carts and horſes to carry to *Glaſgow* a quantity of hay, the produce of a farm which he had in the neighbourhood of the town of *Hamilton*, the defender, on pretence that the exemption granted to the inhabitants of the town, did not extend to the produce of their country-farms, ſtopped the purſuer's horſes and carts, and made them pay toll.

The purſuer thereupon brought a complaint before the ſheriff of *Lanark*, craving repetition of the toll which had been unlawfully exacted from him, and that the defender might be fined in a certain ſum, in reſpect of his wrongous forcible exaction, *&c.*

A proof having been led of the uſe of payment of toll at this bridge, and of the exemption granted to the inhabitants of *Hamilton*, the ſheriff, 30th *April* 1756, "Found the libel relevant; and repelled the objections "thereto: Found it proved, That the inhahitants and burgeſſes of *Hamil-*"*ton* have, for upwards of forty years paſt, been in uſe to paſs the bridge "libelled with their goods and carriages (being their own property) "toll-free: Found it proved, by the writs produced, and other evi-"dences, That the purſuer's dwelling-houſe is ſituated within the li-"mits and territory of the borough of *Hamilton*; and that the right "of paſſing toll-free being ſo conſtituted, the purſuer, as an inhabi-"tant of the borough, had a right to the ſaid privilege and immuni-"ty: Found it proved, That the defender was in the knowledge of "the ſaid privilege and immunity; and, conſequently, that he was *in* "*mala fide* to attempt any alteration or innovation thereof. In reſpect "of all which, and that the defender had acknowledged that he levied "from the purſuer the tolls libelled, ordained him to reſtore the ſame "to the purſuer, fined and amerciated him to the procurator-fiſcal of "court in the ſum of ten ſhillings *Sterling*; found expences due, and "allowed the purſuer to give in an account."

The cauſe was brought before the court of ſeſſion by advocation, at the inſtance of *Robert Storie*, complaining of this judgment.

Pleaded for the defender, By the terms of the grant, the toll in queſtion is impoſed, as a matter of public concern, indiſcriminately upon all perſons and goods paſſing the ſaid bridge, without any exemption in favour of any perſon or community whatever; and if any exemption had been to be granted, the inhabitants of the town of *Hamilton*, who were to reap the chief benefit from the conveniency of this bridge, were leaſt of all intitled to it. As therefore this exemption has no authority from the words or intendment of the grant, although the inhabitants of *Hamilton* had been allowed immemorially to paſs duty-free, this could never found the individuals in a plea of preſcription; becauſe the mere diſuſe of payment, by the tolerance of the leſſees in not exacting toll from the inhabitants, was not ſufficient, without a poſitive right, which could be the title of ſuch preſcription. It is peculiar to the law of *Scotland*, that acts reſpecting private property may be dero-

gated from, and go into deſuetude: And athough public ſtatutes may likewiſe be defeated, or fall into diſuſe, by an univerſal contrary uſage, which, by reaſon of the general practice continued for a great number of years, is ſuppoſed to imply a repeal of ſuch ſtatute by conſent of the legiſlature itſelf; yet no inſtance has occurred, where ſuch public ſtatute has been found to go into diſuſe as to ſome individuals, while it remained in force as to the reſt of the lieges. The inhabitants of *Hamilton* had not, from the beginning, any right to demand this exemption; and the moſt that could be inferred from the uſage in the preſent caſe, was, that this was a mere favour or tolerance by the magiſtrates and town-council, which they were at liberty to continue or recal as they pleaſed. The inhabitants, as individuals, could have no *jus quæſitum* thereby, in a queſtion either with the public, or with the magiſtrates and town-council of *Hamilton*. And as the act itſelf is clogged with no exemption, ſo the tack granted to the defender is in the ſame unlimited terms. And there is no reaſon in law, or expediency, why the defender ſhould be forced to continue to the inhabitants that favour or privilege with which they had been indulged by former tackſmen. But,

2*do*, Suppoſing there were here *termini habiles* for a preſcription founded on the immemorial uſage; yet this privilege can never be ſtretched ſo far as to comprehend all carriages paſſing this bridge from the different parts of the country, merely becauſe they belonged to an inhabitant of *Hamilton*, though they never entered the town or territories thereof. *Quoad* theſe, the inhabitants are ſo many ſtrangers; and therefore ought to pay as others do; and the privilege contended for, ought to be reſtricted to ſuch carriages belonging to the inhabitants as were paſſing to and from the town of *Hamilton*, where they reſided. It is but a very late practice, ſince the inhabitants of the town came to have farms in the country, or to have carriages belonging to them paſſing along this bridge, without coming to or going from the town; and there is no evidence of the pretended preſcription being run, as to carriages of that kind. And therefore, as the carriages belonging to the purſuer, for which toll was exacted, did not come from the town of *Hamilton*, but from his farm in the country, the defender was not obliged to let them paſs without payment of the uſual duties.

Anſwered for the purſuer: To the *firſt*, The exemption of the inhabitants of *Hamilton* from payment of this toll, is clearly proved to have been eſtabliſhed and admitted by all preceding tackſmen for time beyond memory, and has uniformly been acknowledged and inforced by the magiſtrates of *Hamilton*, the granters of theſe tolls. The grants were obtained by the magiſtrates and council, for the behoof of the whole community of the town of *Hamilton*. The grantees are burdened with the expence of upholding the bridge, and the public was ſo far concerned; but in ſo far as the tolls exceeded this burden, which they have always done very conſiderably, the grant was entirely of a private nature, ſubject to the ſame rules of law as any other private right: and it certainly was in the power of the magiſtrates and council to have diſpoſed of the ſurplus tolls, over and above what was neceſſary for upholding the bridge, to any uſe which was beneficial for the whole community. And for the ſame reaſon, they could certainly grant an exemption to their own inhabitants from payment of the tolls, after the example of the neighbouring

bouring boroughs of *Glaſgow* and *Lanark*, reſerving the tolls payable by all other perſons, which were much more than ſufficient for anſwering all the purpoſes of the grant. The purſuer is not poſſeſſed of the act or deed of the town-council by which this exemption was firſt eſtabliſhed; yet the proof of the poſſeſſion of the inhabitants for time immemorial is ſufficient to eſtabliſh the right of exemption in their favour, as well againſt the magiſtrates and council as againſt their tackſman. And it is againſt all the rules of law, to conſider an exemption ſo long and uniformly enjoyed by the whole ſucceſſive inhabitants of this place, without any interruption, as a mere indulgence and tolerance upon the part of the magiſtrates and council, and their tackſman, which it is in their power to recal at pleaſure. The exemption was enjoyed by the inhabitants, not as a matter of indulgence, but as a right conferred upon them by the magiſtrates and council, and was always made effectual by their orders, whenever any diſpute aroſe. And indeed this right was ſo eſtabliſhed, and univerſally known upwards of forty years ago, that it was unneceſſary to mention it as an exception from the different tacks that were granted from time to time; nor did any of the former tackſmen, nor even this defender himſelf, for many years after he became tackſman, think of calling this exemption in queſtion. And ſince the commencement of this proceſs, the defender has granted an obligation to the magiſtrates and town-council of *Hamilton*, acknowledging this right to belong to the inhabitants, though he has been pleaſed, with a view to this ſuit, to except hay growing without their limits.

To the *ſecond*, It is manifeſt from the proof which has been adduced, that this privilege was not local, or confined to goods carried to or from the town of *Hamilton*; but was a perſonal privilege to the inhabitants, by which they were exempted from payment of theſe tolls, for their whole goods or effects, where-ever produced or purchaſed, and where-ever carried, ſo often as they had occaſion to paſs this bridge. And it is particularly proved, by concurring witneſſes, that ſince the commencement of the defender's tack, the purſuer was in uſe of ſending his horſes and carts with hay, corn, and other things, the growth of his farm, along this bridge to *Glaſgow*, and other places; and that no toll was ever ſo much as demanded for theſe goods: and as it is now proved, and indeed acknowledged by the defender's late obligation granted to the town-council of *Hamilton*, that the inhabitants have a right to paſs and repaſs the bridge toll-free, with all manner of goods belonging to them in property, without diſtinction, where theſe goods were produced, manufactured, or bought; what reaſon can poſſibly be aſſigned, why a cart of hay belonging to an inhabitant ſhould not likewiſe be allowed to paſs the bridge toll-free, without diſtinction, whether that hay was produced within the territory of the town, or in the neighbourhood thereof?

"The Lords repelled the reaſons of advocation, and found expences "due." G. C.

Act. *Miller*. Alt. *Lockhart*. Clerk, *Gibſon*.

N° XXVII.

N° XXVII. 22d *June* 1757.

STEWART of BLAIRHALL,

AGAINST

STEWART of APPIN.

The creditors of vaſſals forfeited for the rebellion 1715, *not obliged, by the veſting act, to enter claims, to affect their debtors eſtates falling to the ſuperiors by the clan-act.*

Stewart of *Blairhall* purſued *Stewart* of *Appin*, for a bond of penſion, granted in the year 1714, by the predeceſſor of *Appin*, to the predeceſſor of *Blairhall*.

Appin's *defence* was, That his anceſtor had gone into the rebellion 1715: That the Duke of *Argyle*, his ſuperior, had taken the advantage given him by the clan-act, and entered to his vaſſal's eſtate, though he reſtored it ſeveral years afterwards, burdened with the payment of debts due upon it: That *Stewart* of *Blairhall* had not made any claim upon this debt before the 24th of *June* 1717; and yet, that by the veſting act of the 1ſt of *George* I. *cap.* 40. all ſuperiors and creditors were obliged to enter their claims upon the forfeited eſtates before the 24th *June* 1717, otherwiſe to loſe them; by which neglect *Blairhall* had loſt his right to the debt purſued on.

Anſwered for *Blairhall*, The neceſſity of creditors claiming before the 24th *June* 1717, related only to eſtates veſted in his Majeſty by the veſting act 1*mo George* I. *cap.* 50. and not to eſtates veſted in ſuperiors by the clan-act 1*mo George* I. *cap.* 20. By the clan-act, it was enacted, " That " if any ſubject holding lands of a ſubject-ſuperior in *Scotland*, ſhall be " attainted of high treaſon, his lands, held of any ſubject-ſuperior ſhall " recognoſce, and return into the hands of the ſuperior; and the property " is thereby conſolidated with the ſuperiority, in the ſame manner as if " the ſame lands had been by the vaſſal reſigned into the hands of the ſu- " perior *ad perpetuam remanentiam*." By this act, which was made the ſeſſion before the forfeited eſtates were veſted in the crown for the uſe of the public, the eſtates of vaſſals attainted of high treaſon, were, upon ſuch attainder, *ipſo facto*, veſted in the ſubject-ſuperiors, and became their property, as if they had been reſigned by the vaſſal *ad perpetuam remanentiam*: and therefore the eſtate of *Appin* was, upon *Appin*'s attainder, fully and abſolutely veſted in the Duke of *Argyle*, his ſuperior. In the next ſeſſion, the veſting act was paſſed, by which the eſtates of attainted perſons were veſted in the crown, for the uſe of the public; and thoſe who had any claim out of ſuch eſtates, were appointed to give in their claims, in the time and manner preſcribed by the act: but then, as by the firſt-mentioned act, the eſtates of attainted vaſſals were already veſted in the loyal ſuperiors, it was neceſſary to make an exception of ſuch eſtates from the general veſting clauſe in this laſt act; for

for as theſe eſtates had been formerly veſted in the ſuperiors, they could not by this laſt act be veſted in the crown; and therefore there is the following clauſe inſerted in the veſting act: "Provided always, That "nothing in this act ſhall extend to, take away, alter, or diminiſh "any right, title, benefit, or advantage whatſoever, which any ſu- "perior, vaſſal, *&c.* are, or may be intitled unto, by virtue of an "act for encouraging all ſuperiors, *&c.* or repeal, alter, or make void "any of the pretenſions or things in that act contained, any thing "herein to the contrary notwithſtanding." By this act, therefore, the ſuperior's right, derived from the clan-act, was no wiſe altered; conſequently the eſtates veſted in them by that act were not by this act veſted in the crown; and in conſequence of that again, no claim could be entered upon them, in terms of the veſting act.

"The Lords repelled *Appin*'s defence." J. D.

Act. *And. Pringle.* Alt. *Ferguſon.*

N° XXVIII. 23d *June* 1757.

MACLEAN of LOCHBUY,

AGAINST

DONALD MACNEILL of COLLONSAY.

Relevant to diminiſh the price of lands, that they did not intitle to a vote, when it was bargained that they ſhould intitle.

Maclean of *Lochbuy* ſold the lands of *Ardluſſa* and *Knockintavell* in *Argyleſhire*, to *Macneill* of *Collonſay*.

At the time of the ſale, it was averred by *Lochbuy*, and underſtood by *Collonſay*, that theſe lands were each of them a two-merk land of old extent, ſo as to intitle the holder of them to a vote in the election of a member of parliament. This conſideration was one of *Collonſay*'s inducements, who had no vote in the county, for making the purchaſe. The diſpoſition, however, contained no ſuch condition; it only deſcribed each of the lands to be a two-merk land of old extent.

It afterwards appearing, that the lands conveyed were not valued at four merks of old extent, nor intitled to a vote in the county, *Collonſay* ſuſpended, and inſiſted, either for a reſolution of the ſale, or an abatement of the price.

Pleaded for *Lochbuy*, The allegation, That it was *actum et tractatum* at the time of the ſale, that the eſtate ſold ſhould intitle to a vote, was neither relevant to reſolve the ſale, or abate the price; in reſpect *Collonſay* could not qualify any damage he ſuſtained by the want of a vote; and that to ſay a vote had a value in money, was an allegation in itſelf indecent, and contrary to the ſpirit of the *Britiſh* conſtitution.

Anſwered for *Collonſay*, The privilege of electing, and the capacity of being elected into parliament, are the privileges that diſtinguiſh the ſubjects of *Great Britain* from thoſe of almoſt all other nations. By them a man may become a part of the legiſlature, to guard the honour

and property of himſelf and his fellow-citizens; and accordingly, in advertiſements of eſtates to be ſold, this privilege, when it attends the ſubject offered to ſale, is always mentioned as a circumſtance to inhance the eſtimation of it.

" The Lords found it relevant to diminiſh the price of the lands, " that it was intended by the parties, that the lands ſhould in- " title the purchaſer to a qualification as a freeholder having " right to vote at elections." J. D.

Act. *Wedderburn, Craigie, Ferguſon.* Alt. *Jo. Dalrymple, Hamilton-Gordon, Lockhart.*

N. B. An averment was afterwards made by *Lochbuy*, that the lands at the time of the ſale did intitle to a vote.

N° XXIX. 25th *June* 1757.

HAWKINS HAMILTON and COMPANY of *Lynn-Regis*, and HAWKINS of *Sunderland*,

AGAINST

JOHN COCHRAN.

Recourſe competent on proteſt duly notified, without returning bill and proteſt.

John Cochran drew a bill, bearing value, upon *Fergus Kennedy*, for *L.* 28, payable ſeventy days after date. This bill was indorſed to *Woodrop*, by him to *Hawkins Hamilton* and company of *Lynn-Regis*, by them to *Hawkins* of *Sunderland*, and from him, through ſeveral hands, it came to *Townſhend* of *London*; who not getting payment, regularly proteſted it, and returned it upon *Hawkins* of *Sunderland*.

Hawkins Hamilton and company of *Lynn-Regis* gave due notification of the diſhonour of the bill to *John Cochran*; but *Hawkins* of *Sunderland*, inſtead of returning the bill and proteſt to *Cochran*, ſent it back to a correſpondent at *London*, to try if payment could yet be got of it; by which means the bill and proteſt did not come into the hands of *Cochran* till thirty-nine days after the diſhonour of it.

Cochran being purſued upon recourſe by *Hawkins Hamilton* and company of *Lynn-Regis*, and by *Hawkins* of *Sunderland*, he *objected*, That they had loſt the recourſe, by keeping up the bill and proteſt ſo long as thirty-nine days after the diſhonour, and that they ought to have been returned the third poſt.

" The Lords repelled the defence, and found expences due." J. D.

Act. *Lockhart.* Alt. *Burnett.*

N° XXX.

N° XXX. 25th *June* 1757.

WALTER ANDERSON,

AGAINST

The EXECUTORS of GEORGE HOME.

Determination of a miniſter's ſtipend, whether regulated by the Old or New Style?

George Home had been ordained miniſter of *Chirnſide* prior to the late ſtatute for correcting the calendar. He died on the 5th of *October* 1755.

On the 13th of *May* 1756, *Walter Anderſon* was ordained miniſter of that pariſh.

The executors of *George Home* claimed, in terms of the act 13. 1672, the whole year's ſtipend due for the crop and year 1755, by virtue of his incumbency, and the one half of the ſtipend due for crop 1756, as falling under the ann; in reſpect *George Home* had ſurvived the term of *Michaelmas* 1755 New Style.

Walter Anderſon alledged, he had a right to that part of the ſtipend of crop 1756, in reſpect *George Home* had not ſurvived the term of *Michaelmas*, Old Style; and therefore had right, by his incumbency, to the half only of the ſtipend due for crop 1755; and that the other half was to be conſidered as the ann.

The queſtion was, Whether the determination of a miniſter's ſtipend, who had been ſettled previous to the alteration of the ſtyle, is to be regulated by the New or the Old Style?

Pleaded for *Anderſon*, The act for correcting the calendar enacts, "That nothing in this act contained ſhall extend, or be conſtrued "to extend, to accelerate or anticipate the time of payment of any "rent or rents, annuity or annuities, or ſum or ſums of money what-"ſoever, which ſhall become payable by virtue and in conſequence of "any cuſtom, uſage, leaſe, deed, writing, bond, note, contract, or "other agreement whatſoever, now ſubſiſting, or which ſhall be "made, ſigned, ſealed, or entered into, at any time before the ſaid "14th of *September*, or which ſhall become payable by virtue of any "act or acts of parliament now in force, or which ſhall be made be-"fore the ſaid 14th of *September*, or the time of doing any matter or "thing directed or required by any ſuch act; or to accelerate the pay-"ment of, or increaſe the intereſt of any ſuch ſum of money, which "ſhall become payable as aforeſaid; or to accelerate the time of deli-"very of any goods, merchandiſes, or other things whatſoever; or "the time of the commencement, expiration, or determination of any "leaſe, *&c.* or of any other contract or agreement whatſoever; or "the time of attaining of the age of twenty-one years, or any other "age requiſite by any law, uſage, cuſtom, *&c.* for doing any act, or "for any other purpoſe whatſoever, by any perſon or perſons now "born,

" born, or who ſhall be born before the ſaid 14th of *September*;—but " that all and ſundry the premiſſes ſhall commence, ceaſe, and deter- " mine, at and upon the ſame reſpective natural days and times as " would have happened in caſe this act had not been made." Now, if Mr *Home*'s ſurvivance of the now legal term of *Michaelmas* was to give his executors a right to the ſtipend in queſtion, this would be to anticipate and accelerate the term of payment; ſeeing, that if the ſtatute had not been made, his executors could not have drawn that ſtipend, unleſs he had ſurvived the old term of *Michaelmas*. The claim of the heirs is for an acceleration and anticipation of payment; it is a demand of a ſum, which plainly could not have been aſked, if the ſtyle had not been altered; and cannot be due from the accident of that alteration, when the ſtatute itſelf provides, that no anticipation of payment ſhall therefrom ariſe.

Anſwered for the executors, The ſtyle-act for regulating the commencement of the year, and correcting the calendar then in uſe, proceeds upon a recital, " That the *Julian* calendar, then in uſe through- " out the *Britiſh* dominions, had been diſcovered to be erroneous; by " means whereof the vernal equinox, which, at the time of the coun- " cil of *Nice*, in the year 325, happened on the 21ſt of *March*, now " happens on the 9th or 10th of that month; and the ſaid error is ſtill " increaſing, and, if not remedied, would, in proceſs of time, occa- " ſion the ſeveral equinoxes and ſolſtices to fall at very different " times, in the civil year, from what they formerly did, which " might tend to miſlead perſons ignorant of ſaid alteration." And, after obſerving, that moſt other nations in *Europe* had already corrected this error in the calendar, and that it would be of general convenience to merchants, and all perſons who correſpond with other nations, and tend to prevent miſtakes and diſputes, the ſtatute enacts, " That the next day after the 2d *September* 1752, ſhall be accounted " the 14th *September*; and that the ſeveral natural days which follow " the 14th *September*, ſhall be reckoned and numbered forward, in nu- " merical order, from the ſaid 14th *September*, according to the order and " ſucceſſion of days uſed in the calendar." And as the feſtivals, both fixed and moveable, are declared to be regulated according to the new ſupputation; ſo, in particular, the feaſt and term of *Whitſunday*, which gives occaſion to the preſent queſtion, is declared, by the new calendar, which is ſubjoined to and confirmed by the act, to be the 15th of *May*, according to the ſupputation enacted by the ſtatute:—The ſtatute fixes the different terms, as they are now eſtabliſhed, and repeals the old ones. So that the act in queſtion, fixing certain preciſe, general, legal terms, to come in place of the former ones, the right of heirs and executors is now to be determined by their predeceſſor's ſurvivance of theſe general legal terms, and not by his ſurvivance of the exploded ones. The intention of the ſtatute was, to correct the errors of the former computation, to bring us unto a conformity with other nations, and to prevent miſtakes and diſputes in time coming. The interpretation contended for by the charger, would, on the contrary, make us relapſe into thoſe errors, make our practice diſconform to that of other nations, and create miſtakes and diſputes in time coming. It would eſtabliſh the authenticity of that term which it meant to repeal; it would create two ſtyles, where it meant to eſtabliſh one; and it would become

become a ſource of various diſputes and controverſies, in every caſe that ſhould occur from time to time, whether the one or the other of the legal terms ſhould be moſt applicable to it.

Upon this plan, queſtions of ſucceſſion and of legal diligence are determined. When a proprietor of land dies, the law divides the property of his eſtate betwixt his heirs and executors, according to the legal terms of *Whitſunday* and *Martinmas*, as they are now aſcertained: ſo that if he ſurvives the firſt, his executors have a right to a half of the rent due for the crop; and if he ſurvives *Martinmas*, as now aſcertained, they have a right to the whole.—Upon the ſame plan, when a man leaves a wife, who is not provided by contract of marriage or other deed, who is therefore intitled to be ſerved to a terce; if he dies upon the 20th *May*, in any year ſince the 1752, the terce will only intitle her to the half of the rents payable for that crop, and the other half belongs to her huſband's executors, becauſe he ſurvived the legal term of *Whitſunday*; though, if he had happened to die upon the ſame natural day in any year before the ſtatute took place, as the preſent 20th of *May* was then computed the 9th, his executors would have had no right to any part of the crop of that year, but the whole payable for that crop would have been divided betwixt the heir and the tercer.—And, for the ſame reaſon, when a huſband dies upon the 20th of *May*, ſince 1752, his relict will be intitled to be alimented in the family, down to the term of *Martinmas*, when her right by the terce commences; though, if he had died upon the ſame natural day before the act, ſhe would have been alimented only for ſix days, becauſe, at that period, ſhe was intitled to the rent of the lands, which are underſtood to be due at *Whitſunday*; and her executors would have drawn them, though ſhe had died next day, before they were paid, or even before they were payable by the conventional terms betwixt the heritor and the tenant.—And the ſame rule takes place, in caſe a married woman, who is proprietor of lands, ſhould deceaſe upon the 20th *May*, or upon any other of theſe diſputed days, the *courteſy* would take place only from the ſubſequent term of *Martinmas*, although it would have taken place at *Whitſunday* if ſhe had died before the year 1752.—Or, if the courteſy is excluded, either by paction or by a tailzie, or becauſe there were no children born of the marriage, then the wife's heir will enter to the lands at the *Martinmas* after her death, and the huſband will have right to the firſt half of that year's rent, though he could have taken no part of it if ſhe had died upon the ſame natural day in any year before the act.

The ſame analogy affects the rule with reſpect to legal diligences. In theſe, the profits of lands, or any other ſubject, are divided betwixt different parties, according to the legal terms. Thus, if an adjudication is led upon the 20th of *May* ſince the act, the adjudger will only have right to the half of the rent payable for that crop, and the other half muſt be affected by arreſtments; though the adjudication would have carried the whole year's rent if it had been led upon the ſame day before the act took place.

With reſpect to the difficulty occurring from the acceleration of payment, that difficulty only ariſes from not diſtinguiſhing betwixt the conventional and the legal terms of payment. Even the act 13. of 1672, which fixed the rights of the different ſucceſſors of miniſters,

ſpeaks nothing of the conventional terms of payment, which vary according to uſage, or the nature of the ſubject in which the ſtipend is payable: As for example, if it is payable in victual, it cannot be paid either at *Whitſunday* or *Michaelmas*, but betwixt *Yule* and *Candlemas*, as it is only during ſuch period that ſuch rent can be paid; but theſe terms at which *dies venit*, or payment may be exacted, are independent of the legal terms at which *dies cedit*, or the right is veſted. And in the ſame manner, the ſtatute in queſtion leaves the conventional terms upon their own footing, bars the accelerating payment to the prejudice of them, and leaves the day as it was when payment may be exacted; although it makes *diem cedere*, or the right to veſt, according to the general legal term, which is to be the rule as to the veſting of rights in all time coming.

To illuſtrate this, let the following example ſuffice. Suppoſe that, before the ſtatute, the rents of an eſtate were all payable by the tenants tacks at the legal term of *Whitſunday* or *Martinmas*, as the term then ſtood; the effect of this ſaving clauſe would be, to ſuperſede the payment during the ſubſiſtence of theſe tacks, to the 26th *May*, and 22d of *November*, that the tenants might not be hurt by the acceleration of the term of payment, before the expiration of the full number of natural days ſtipulated by their leaſes. But ſurely this could have no effect upon the diviſion of the rents betwixt the heir and executor of the proprietor of ſuch lands deceaſing after the act, or upon the commencement of the terce or courtſey falling upon deceaſe: all theſe rights muſt be decided by the legal terms, at whatever diſtance the conventional had been originally from them: the ſaving clauſe did not affect the right veſted by the legal term; and conſequently the ſuperſeding the demand of payment cannot any wiſe affect the preſent queſtion. The exception was introduced merely in favour of the debtor, merely that his term of payment might not be accelerated; but by no means to affect the rights of third parties, who had no title to claim under the exception.

" The Lords found, That Mr *Home*, the late incumbent, having " died before *Michaelmas* 1756, according to the old computation, " had no right to the laſt year's ſtipend for that year, but that " the ſame does belong to his neareſt of kin as ann; and that Mr " *Anderſon* having been entered before *Whitſunday* 1756 according " to the ſame computation, has right to the firſt half-year's ſti- " pend payable for crop 1756." J. D.

Act. *Brown, Ferguſon.* Alt. *Wal. Pringle, Lockhart.*

N° XXXI.

N° XXXI. 27th *June* 1757.

GAVIN BEUGO,

AGAINST

JOHN BEUGO.

Common brother rejected as a witneſs.

Gavin Beugo brought a proceſs againſt his brother *John*, for deſtroying a deed executed by their father in *Gavin*'s favour; and to prove the fact, cited their common brothers and ſiſters as witneſſes. From the examination of two of the brothers and ſiſters, and ſome other witneſſes, the fact came out, as alledged by *Gavin*, pretty clear; and that the brothers and ſiſters had been aſſiſting in deſtroying the deed; for which reaſon, *Gavin* dreading the evidence of the other brothers and ſiſters, ſtopped ſhort in his proof, and declined examining them.

John inſiſted to have the brothers and ſiſters examined, as having been once cited, and being equally relations to both parties.

Anſwered, Brothers and ſiſters may be witneſſes againſt, but not for a defender; and from the evidence already brought, it appears the witneſſes now inſiſted for have an intereſt to ſwear falſely.

" The Lords having adviſed the proof already adduced, refuſed to " allow the other brothers and ſiſters to be examined." J. D.

For *Gavin*, *John Dalrymple*, *Craigie*. Alt. *Miller*, *Lockhart*.

N° XXXII. 2d *July* 1757.

CREDITORS of DOUGLAS of DORNOCK,

AGAINST

ROBERT and JOHN CARLYLES.

Prorogation of a tack, if good againſt creditors?

IN *July* 1729, *Douglas* of *Dornock* having borrowed a ſum from *Robert* and *John Carlyles*, granted them a leaſe of certain lands, at a rent equal to the intereſt of their money, to continue for twenty-one years, with a power of retaining the rent for payment of their intereſt.

The leaſe contained a clauſe, by which it was prorogated from year to year after the elapſe of the term ſtipulated, " ay and while the prin- " cipal ſum in the bond remained unpaid."

The eſtate of Mr *Douglas* was ſequeſtrated at the ſuit of heritable creditors

creditors and adjudgers in *July* 1756, after the twenty-one years ſpecified in the leaſe were elapſed. But the tenants *inſiſted*, That, in virtue of the prorogation, they were intitled to continue in the farm till their debt was paid.

Argued for the creditors of *Dornock*, That though tacks are, by the law of *Scotland*, real rights from the time poſſeſſion has followed upon them; yet prorogation of tacks do not become real till poſſeſſion has commenced upon the prorogation; and if a preferable right intervenes before ſuch poſſeſſion commences, the tack cannot be effectual: That the prorogation in this caſe is from year to year; and therefore poſſeſſion had not followed upon the prorogation for the year 1757, before the ſequeſtration intervened at the ſuit of heritable creditors and adjudgers in *July* 1756, by which the creditors came to have a preferable real right to the whole eſtate, and to the management of it under the direction of the court: That this point of law had been decided by the court, *January* 1757, *Thomas Scot* againſt the creditors of Lord *Cranſton*, although a contrary deciſion had formerly been given, *January* 1725, *Richard* againſt *Lindſay*, where it was found, that poſſeſſion upon a former ſubſiſting tack was ſufficient to render a prorogation real, though the term of entry upon the prorogation was not come.

" The Lords found, That the tack could not ſubſiſt by virtue of " the annual prorogation, after the eſtate was ſequeſtrated." W. J.

Act. *Johnſtone.* Alt. *H. Dalrymple.* Clerk, *Forbes.*

N° XXXIII. 2d *July* 1757.

JOHN WARRAND and JOHN MACDONALD,

AGAINST

WILLIAM MACPHERSON.

The tranſacting theft, but not concealing the crime, found not to be theft-boot.

John Macdonald having been robbed on the highway by *Evan Macpherſon*, for which *Evan Macpherſon* had been impriſoned, but liberated upon bail, *William Macpherſon*, a friend of *Evan*'s, a few days after the bail, granted a bill for *L.* 26 to *John Macdonald*, which was the value of the goods loſt, and of the expences *Macdonald* had laid out in finding out the robber. In conſideration of which *John Macdonald* granted a diſclamation of the following tenor. " I *John Macdonald* chap-
" man in *Stratherick*, do hereby diſclaim all action, inſtance, and ex-
" ecution that may be competent to me againſt *Evan Macpherſon* in
" *Gargaſk* of *Badenoch*, for and on whatever account, preceding this
" date; and particularly any criminal action that I might have againſt
" him the ſaid *Evan*, for and on account of a robbery and atrocious
" riot and attack committed by him upon my perſon, and merchant-
" goods, on the King's high-road, in the hill of *Corrieyarrick*, on the
" 4th

" 4th *June* laſt, with all that may be competent to follow thereon, for " now and ever."

Macdonald, neither before nor after this, ever made any ſecret of the robbery; and *Evan Macpherſon* was afterwards tried, condemned, and executed for the crime, at the inſtance of the King's Advocate. *Macdonald* being cited, appeared as an evidence againſt him in the trial.

In an action at the inſtance of *Macdonald*, and *Warrand*, his aſſignee, againſt *William Macpherſon*, for payment of this bill of *L.* 26 *Sterling*, it was *objected* by *William Macpherſon*, That, in the above tranſaction, *Macdonald* had been guilty of *theft-boot*, and thereby had forfeited any claim upon the bill in queſtion.

Anſwered for *Macdonald*, To make *theft-boot*, not only the tranſaction of a crime is required, but alſo the concealment of it, ſo as to be aſſiſting in the defeat of juſtice, or putting the thief *frae the law*, as the act *James* V. *parl.* 1. *cap.* 2. expreſſes it. But here *Macdonald* only took payment of what he had himſelf loſt; and he was ſo far from concealing the crime to defeat juſtice, that he told it to all the world.

" The Lords found, That action lay on the bill." J. D.

Act. *Montgomery, Lockhart.* Alt. *John Dalrymple, And. Pringle.*

N° XXXIV. 4th *July* 1757.

Hearing in Preſence.

ROBERT SHEDDAN,

AGAINST

A NEGRO.

If a negro-ſlave, by being brought to Britain, *and chriſtened, becomes free?*

A Negro who had been bought in *Virginia*, and brought to *Britain* to be taught a trade, and who had been baptized in *Britain*, having claimed his liberty againſt his maſter *Robert Sheddan*, who had put him on board a ſhip to carry him back to *Virginia*; the Lords appointed counſel for the negro, and ordered memorials, and afterwards a hearing in preſence, upon the reſpective claims of liberty and ſervitude by the maſter and the negro.

But during the hearing in preſence, the negro died; ſo the point was not determined. J. D.

For *Sheddan, Jo. Dalrymple, Lockhart.* For Negro, *Montgomery, Dav. Dalrymple, Ferguſon.*

N° XXXV. 6th *July* 1757.

JOHN HAY of LAWFIELD, and others,

AGAINST

The DUKE of ROXBURGH.

Debated, Whether, in conſequence of the Reformation, the patrons of benefices without cure, became heritable proprietors of the teinds annexed to theſe benefices?

THE Duke of *Roxburgh* had right, by progreſs, to the patronage of the prebendary of *Pinkerton*. In a proceſs of valuation and ſale brought by *John Hay* and others, the tithes of whoſe eſtates belonged to that prebendary, it was *inſiſted* for the Duke, That the price of the ſurplus-teinds muſt be rated at *nine* years purchaſe: For that, as patron of this prebendary, which was not a benefice of cure, he had a full right to the tithes, prior to the acts of parliament 1690 and 1693: That the tithes of benefices *ſine cura* returned to the patrons after the Reformation *pleno jure*; but as at that time tithes were conſidered as ſacred, the patrons of provoſtries and prebendaries were, by act 12. parl. 1657, allowed and requeſted to preſent burſars to ſuch benefices; but that act of parliament laid no poſitive injunction upon the patrons, to apply the tithes of their benefices to theſe uſes. In proceſs of time, though the form of preſentation was kept up, the preſentee was underſtood to be but a name, with whom the patron, without being guilty of ſimony, might paction for the whole profits, for behoof of the patron himſelf: And at laſt, theſe forms were omitted, and the patrons of theſe benefices without cure, were underſtood to have an heritable right to the tithes. Upon this footing, the teinds of *Hedderwick*, lying in the ſame pariſh of *Dunbar*, were rated, in the year 1679, at nine years purchaſe; and in the year 1724, Sir *Hew Dalrymple*, then preſident of the court of ſeſſion, was decerned to pay nine years purchaſe for his teinds of *Weſtbarns*.

Anſwered, The Duke had no heritable right to the tithes of this prebendary antecedent to the acts 1690 and 1693; and it is a conſequence of the right which he acquired by theſe ſtatutes, that he is only intitled to demand *ſix* years purchaſe. The patrons of prebendaries and provoſtries did not, by the Reformation, acquire a right to the fruits of theſe benefices. They continued ſtill to preſent prebends or provoſts: and though theſe were, indeed, but a name, and the patron often by that means indirectly enjoyed the fruits; yet this was a benefit not given to him by any law: on the contrary, it was enacted, parl. 1567, c. 12. " That all patrons, having provoſtries or prebendaries at their " gift and diſpoſition, may, in all time coming, preſent the ſame to " burſars to ſtudy virtue and letters, within any of the univerſities of " this realm,—which ſhall be no hurt or prejudice to their patronage, " notwithſtanding their foundations; and our ſovereign Lord and e-

" ſtates

" ſtates heartily requeſts all ſuch patrons, to grant and diſpone their " provoſtries and prebendaries to the burſars aforeſaid."

And by act 161. parl. 1592, the former act is ratified, with this addition, " That the ſaid burſars, ſtudents, and titulars, lawfully provi- " ded to the ſaid prebendaries, ſhall bruik, enjoy, and poſſeſs, in all " time thereafter, the haill rents, profits, and emoluments contain- " ed in the ancient foundations made by the ſaid laick patrons." —— Thus the patrons had no right to the fruits or tithes of theſe benefices; and if they preſented burſars or titulars for their own behoof, from whom they obtained tacks, or who poſſeſſed them in truſt, this was an abuſe of the law, and did not conſtitute a right.

That the patrons were never held to be titulars, appears from act 54. parl. 1661, which declares, " That the entry of the vaſſals of provo- " ſtries and prebendaries, by retour, precept of *Clare conſtat*, reſigna- " tion, compriſing, or otherwiſe, ſhall pertain to the laick patrons; " reſerving to the *titulars* of ſaid provoſtries, *&c.* the fruits, rents, " and emoluments of theſe, which are no wiſe to be prejudged by this " preſent act." The entry of vaſſals was, by this act, for the conveniency of the vaſſals, given to the patrons of theſe benefices; but the fruits were reſerved to the *titulars*.

The acts 1690 and 1693 gave the right of the teinds of pariſhes, not heritably diſponed, to the patrons of all parſonages and other benefices, without exception. Theſe ſtatutes make no diſtinction between benefices of cure, and without cure; and they limit the price to ſix years purchaſe.

Debated, but not determined. W. J.

For the Duke, *Lockhart.* Alt. *And. Pringle, Ferguſon.*

N° XXXVI. 6th *July* 1757.

CHARLES FRASER of INVERALLACHY,

AGAINST

His MAJESTY's ADVOCATE.

Diſpoſition of a ſuperiority in order to give a vote, upon which charter and infeftment followed, but no other delivery, found not good againſt the crown's right by forfeiture.

IN 1740, *Simon* Lord *Lovat* executed a diſpoſition of certain lands in favour of *Charles Fraſer* of *Inverallachy*. In 1742, a charter was taken out, and in 1743, infeftment followed. *Charles Fraſer* rediſponed the ſame lands to Lord *Lovat*, to be holden of him for payment of *L.* 6 *Scots* yearly, retaining thereby the ſuperiority.

Lord *Lovat* was attainted of high treaſon 19th *March* 1747.

Charles Fraſer, agreeable to the directions of the act of parliament of *George* II. veſting the eſtates of certain traitors in the crown, entered a claim for the ſuperiority of the lands diſponed to him; and alſo claimed the property of the ſame lands, in terms of the act 1*mo George* I. called

called the *clan-act*, as being a ſubject-ſuperior who had continued peaceable and dutiful.

The claimant was examined upon oath, and gave this account of his right: " That he paid no value for the lands mentioned in his claim: " That he had expreſſed to Lord *Lovat* a deſire to have a qualification " to vote for a member of parliament in the county of *Inverneſs*, which " his Lordſhip ſaid he would give him: That ſome time after, he re- " ceived a letter from Lord *Lovat*, giving him notice, That he had " made a diſpoſition in his favour: That the diſpoſition was never de- " livered to the deponent, nor in his hands, nor did he ever ſee it: " That he gave no orders with regard to the charter or ſeiſin, nor paid " the expence of either, which was done, he believes, by Lord *Lovat* " himſelf; but that he gave orders to his agent, to take the advice " of counſel as to the proper manner of framing his qualification, " and making it effectual: That he paid the expence of this, and pro- " duced the ſigned opinion of his counſel, and the queries to which it " referred, dated in 1741: That the charter and ſeiſin were never in " his hands except at the general election 1747, where he voted as a " freeholder: That he knew not by whom they were put into his hands; " but that he left them with the ſheriff-clerk, to be returned to *William* " *Fraſer*, who was his agent, and had alſo been Lord *Lovat*'s agent: " That he did not grant any obligation for reconveying to Lord *Lovat* " the ſuperiority of the lands; nor was ever any ſuch obligation aſked " or demanded of him."

It was *objected* to this claim by his Majeſty's Advocate, That the right granted to the claimant was nominal and fictitious, for the ſole purpoſe of giving him a right to vote: That Lord *Lovat* kept the diſpoſition always in his own poſſeſſion, in order that the right might be always under his power: That the charter and ſeiſin were afterwards obtained at the expence, and by the direction of Lord *Lovat*, not of the claimant; and it appeared that neither of them were ever in his poſſeſſion, except for a moment; and that he immediately reſtored them to Lord *Lovat*'s attorney.

Anſwered, The intention of Lord *Lovat* was indeed to give the claimant only a right to vote; but in order to do this, it was neceſſary to give him an abſolute and complete right to the ſuperiority of theſe lands; and this he appears to have done. The queries, and ſigned opinion of counſel in 1741, ſhow, that it was the intention to give the claimant the ſuperiority abſolutely and irredeemably. The not delivery of the diſpoſition appears to have been accidental, the claimant having neglected to aſk for it; but the omiſſion was of no importance, as the infeftment taken upon the charter in 1743, was a delivery in the ſtrongeſt and moſt irrevocable manner, after which Lord *Lovat* had no further power over the right: and the claimant was under no obligation, expreſs or implied, to reconvey the ſuperiority to Lord *Lovat*.

" The Lords diſmiſſed the claim." W. J.

For the claimant, *Johnſtone*. Alt. King's Counſel, *Macqueen*. Clerk, *Kirkpatrick*.

N° XXXVII.

N° XXXVII. 6th *July* 1757.

HUNTER,

AGAINST

AITKEN.

A perſon puniſhed for a riot, though in the recovering a continued poſſeſſion.

Aitken had, for ſome years, poſſeſſed a ſeat in the church of *Aberdour*. *Hunter*, apprehending he had a preferable right to that ſeat, ſent a peremptory meſſage to *Aitken*, That he would next *Sunday* take poſſeſſion of it; and accordingly took his place a little before *Aitken* came to church. *Aitken* arriving, deſired him to come out; and, upon his refuſal, gave him names, and ſeized him by the collar. At this time public worſhip was begun by ſinging pſalms, and the congregation was diſturbed. *Hunter*, after ſome ſtruggle, left the ſeat, but brought an action againſt *Aitken* for the riot.

" The Lords impoſed a fine of *L.* 2 *Sterling* upon *Aitken* for the riot, " payable to the poor of the pariſh; but in reſpect *Hunter* had " endeavoured by his own authority to invert a continued poſſeſ- " ſion, they found no expences due." W. J.

Act. *Wedderburn, Wa. Stewart.* Alt. *And. Pringle.* Clerk, *Home.*

N° XXXVIII. 6th *July* 1757.

WILLIAM FRASER *junior*,

AGAINST

His MAJESTY's ADVOCATE.

A penſion granted to an agent for life, and his continuing to act faithfully as agent to the granter, found to continue, notwithſtanding the granter's forfeiture.

William Fraſer junior, writer to the ſignet, entered a claim on the forfeited eſtate of *Lovat*, upon a bond of penſion granted by the late Lord *Lovat* to him, in the year 1741, of the following tenor: " I " *Simon* Lord *Fraſer* of *Lovat*, conſidering that *William Fraſer junior* writer " to the ſignet, will be at conſiderable pains and trouble in managing " my law-affairs at *Edinburgh*, I am reſolved to ſettle on him the " yearly ſalary under written. Therefore I bind and oblige me, my " heirs, and ſucceſſors, to content and pay to the ſaid *William Fraſer*, " his heirs and aſſignees, the ſum of *L.* 15 *Sterling* money yearly, and

" each year, during all the days of his life, and his continuing to act " honeſtly and faithfully for me, and my ſucceſſors, as agent and " doer; and that from the term of *Whitſunday* next, and ſo forth there- " after during his life, and willing to act for me, and mine, in manner " above mentioned."

It was *objected* to this claim, by his Majeſty's Advocate, That the bond is not conceived in the terms of a liferent-annuity: it does not bear to be granted for ſervices paſt, neither does it bear to be for love and favour; the inductive cauſe is future ſervices, the obligatory clauſe is during Mr *Fraſer*'s life, and his continuing thoſe ſervices honeſtly and faithfully; and there being now no ſervices to perform, the penſion falls.

Pleaded for Mr *Fraſer*, The bond is to him during his life, and as long as he is willing to act, and acts faithfully; and as no objection could have been made, either to his willingneſs or fidelity, by Lord *Lovat* or his heirs, he cannot be forfeited of his right by the fault of Lord *Lovat*, in bringing his eſtate into a ſituation to need no ſervices: And as Lord *Lovat* and his heirs would have been bound in the preſent caſe to the claimant, ſo the crown, in their right, muſt be bound alſo.

" The Lords ſuſtained the claim." J. D.

For the claimant, *Montgomery, David Dalrymple, John Dalrymple.* Alt. King's Counſel.

N° XXXIX. 6th *July* 1757.

DAVID WILSON,

AGAINST

WILLIAM SELLERS.

Grounds and warrants,—ſiar,—no equity will relieve againſt want of infeftment.

IN the year 1669, *Robert Davidſon* granted a bond to his father *Henry*, and his ſiſter *Agnes*, in which he " grants him to have borrow- " ed and received, really and with effect, in numerate money, from " *Henry Davidſon* his father, and *Agnes Davidſon* his ſiſter, the ſum of " 600 merks *Scots*; which ſum of 600 merks money foreſaid, he there- " by binds and obliges him, his heirs, *&c.* thankfully to refund, " content, pay, and again deliver to the ſaid *Henry Davidſon* and " *Agnes Davidſon*; and failing them both by deceaſe, to any perſon the " ſaid *Henry Davidſon* pleaſes."

Some months after, *Henry Davidſon* granted a bond for 1000 merks to his daughter *Agnes*, and ſoon after died.

Upon *Henry Davidſon*'s death, *Agnes* is ſaid to have raiſed letters of general charge in that ſame year 1669 againſt *Robert* to enter heir to his father. She likewiſe, in the ſame year, obtained letters of inhibition againſt *Robert*; which inhibition mentioned the letters of general charge, but not the bonds.

After this *Robert* made up titles to ſome houſes belonging to his father,

ther, and ſold them; one of which came, by progreſs, into the hands of *David Wilſon*.

Henny Davidſon never aſſigned to *Agnes* his half of the 600 merks bond, nor did ſhe make up any title to it upon her father's death; but ſhe conveyed away the whole of the 600 merks bond, and likewiſe the 1000 merk bond; and they came both by adjudication into the perſon of *William Sellers*, who was infeft.

William Sellers brings a reduction of *David Wilſon*'s diſpoſition, on the head of *Agnes Davidſon*'s inhibition againſt *Robert*, the diſponer; but in this proceſs he did not produce *Agnes*'s letters of general charge, though called upon to do it, and not denying that he had them.

Objected for *David Wilſon*, That as the inhibition proceeded upon the letters of general charge, and upon them ſolely, it is as neceſſary that theſe letters, being the ſole ground of the inhibition, be produced, in order to ſupport the inhibition, as it would have been to produce the bonds themſelves, if the inhibition had proceeded upon them.

Anſwered for *Sellers*, It is a general rule of practice, That the production of ſuch letters cannot be called for after twenty years.

Replied, The rule applies only to the caſe where, after a certain time, a perſon has not the letters to produce, but not to the caſe where he has the letters, but will not produce them. In the former caſe, the law pardons the not production of them, becauſe, *poſt tantum temporis*, there is a preſumption they may have been accidentally loſt; but where that preſumption ceaſes, it would be perverting the very intention of the law, to turn into a hardſhip againſt one perſon that remedy which was only intended to relieve from ſuch hardſhip another. The remedy is only applied when a remedy is needed, when there is a loſs; but it cannot be extended to a caſe where no remedy is needed, where there is no loſs. Equity ſupports the one; but as only the conſciouſneſs of a defect can be the motive of a party's refuſing to produce, who can produce, the ſame equity cannot be pleaded by him.

As the diſpenſation pleaded by the purſuer has been introduced, not by ſtatute, but by courts, it cannot go the length to give a perſon the benefit of a preſcription, total and unlimited. For though a ſtatute may introduce a preſcription, after the running of which perſons ſhall be ſafe, either who cannot or will not produce; yet ſuch an extenſion is beyond the power of a court of juſtice; which is indeed intitled to help out the common law when it would involve a hardſhip, but not to thwart its courſe when it would involve none.

" The Lords found no neceſſity upon *Sellers* to produce the letters " of general charge."

Objected for *Wilſon*, 2*do*, *Sellers* could not found upon *Agnes Davidſon*'s conveyance of the 600 merk bond, further than to the extent of one half of the 600 merks; becauſe *Agnes* herſelf had no right to more than one half of that bond, ſeeing *Henry* was fiar in one half, and ſhe only fiar of the other; and therefore ſhe required to be ſerved heir in general to *Henry*, in order to carry his half.

Anſwered for *Sellers*, *Henry* was fiar of the whole, and *Agnes* only ſubſtituted to him, which was preſumed from the relation betwixt the parties; and conſequently no general ſervice or other title was needed in the perſon of *Agnes*, as being a *nominatim* ſubſtitute.

Replied,

Replied, The general rule of law is, That when a ſum is taken to two perſons, thoſe two perſons are each fiars for their half; and their halves fall by their deaths to be taken up by their reſpective heirs or neareſt of kin.

It is true, that though this is the rule in general, certain preſumptions create certain limitations of it. When the ſum is taken payable to huſband and wife, there the huſband, as *dignior perſona*, is fiar; becauſe, if the ſum is his own, or if another gives it, in the one caſe he is ſuppoſed to have taken, and in the other to have got it to himſelf; and yet even this limitation, by the later law, is ſubject itſelf to exceptions.

On account of the ſame preſumption, when, in a marriage-contract, or in an obligation relative to a marriage, both the father and children are named fiars, there the father will be accounted fiar alone; becauſe it is ſuppoſed he has taken or got the ſecurity, ſo as to ſerve himſelf in the mean time, reſerving a *ſpes ſucceſſionis* to his children after his death.

In theſe caſes, the law hath made a ſtretch, and departed from the general rule; not however on account of the connection betwixt the parties, but on account of the preſumption ariſing from the huſband's being the *nobilior perſona*, in the one caſe, and from the general views of mankind in ſettlements, in conſequence of marriage, in the other.

When ſuch preſumptions, therefore, do not take place, the general rule, as in the preſent caſe, ought to prevail; and the preſumption which might ariſe from the circumſtance here of the connection betwixt father and daughter, is removed by the circumſtance of the narrative in the bond, that *Robert* had received the money both from *Henry* and from *Agnes:* For as it is a very poſſible caſe, that *Agnes* may have had the one half of this ſmall ſum of her own, perhaps left to her in a legacy, the father and daughter, creditors in the bond, are no more to be conſidered as fiar and ſubſtitute, than if they had been abſolute ſtrangers to each other. The preſumption ariſing from their relation, as father and daughter, is balanced by the preſumption ariſing from their being, as appears, joint creditors, by the receipt of one half of the money from *Agnes*. Therefore the law is left to take its common courſe, and to follow its above-mentioned general rule.

" The Lords found, That there was no neceſſity for a general ſer-
" vice, to eſtabliſh the right to the 600 merk bond in the perſon
" of *Agnes Davidſon*."

In the year 1668, prior to the inhibition, *Henry Davidſon* had granted an heritable bond for 500 merks to *Wilſon*'s author. In the year 1670, poſterior to the inhibition, *Robert Davidſon* ſold a houſe to *Wilſon*'s author, in part payment of which it was agreed the 500 merks bond ſhould go; and for that reaſon, *Wilſon*'s author took no infeftment upon the bond, but took it upon the diſpoſition, not knowing of the intervening inhibition.

Wilſon's diſpoſition being cut down by the inhibition in conſequence of the above two interlocutors, *Wilſon* next *inſiſted*, That he ſhould at leaſt be allowed to compete with *Sellers* upon the 500 merks bond, againſt which the poſterior inhibition could not ſtrike.

Anſwered,

Anſwered for *Sellers*, As there was no infeftment upon the bond, it could not come in competition with him, a creditor-adjudger infeft.

Replied for *Wilſon*, In equity, the bond ſhould be ſuſtained as if infeftment had followed upon it. The reaſon why no infeftment paſſed upon the bond was, that, immediately after, the bond went in payment for a diſpoſition, upon which infeftment followed. The inhibition could never have ſtruck againſt the bond, had infeftment followed on it; and *Wilſon*'s deception, in not taking infeftment upon that bond, which he had a right to have taken, and in lieu thereof, taking infeftment upon that diſpoſition, which came in place of the bond, ought not to have the effect to cut him out of the validity of his bond; on the contrary, according to the principles of equity, it would appear, that his infeftment upon the latter ſhould ſupply the place of infeftment upon the former.

" The Lords found *Sellers* preferable." J. D.

Act. Rae, Hamilton-Gordon, Ferguſon, *Alt. Jo. Dalrymple, Lockhart.*

N° XL. 8th *July* 1757.

HENRY DUKE of BUCCLEUCH, and his tutor *ad litem*,

AGAINST

The CREDITORS of FRANCIS DUKE of BUCCLEUCH.

Narrative of a diſpoſition inter conjunctos, *if probative againſt creditors?* — *Delivery* retenta poſſeſſione.

FRancis Duke of *Buccleuch*, grandfather of the preſent Duke, held the eſtate of *Buccleuch* in *Scotland* under a ſtrict entail, by which the heirs of entail were prohibited to contract debts beyond the extent of 100,000 merks: And it was thereby provided, That the heir of entail contravening, ſhould forfeit the eſtate, not only for himſelf, but for his deſcendents. The Duke was poſſeſſed of another eſtate in the county of *Lincoln* in *England*, which was ſettled, after the failure of the heirs, to revert to the crown; which diſabled any of the heirs to burden or diſpoſe of the lands, ſo long as the reverſion remained with the crown.

The Duke of *Buccleuch*, having contracted debts to a very conſiderable extent; in order to provide a fund for payment of theſe debts, it was judged expedient, that application ſhould be made to parliament, for a diſcharge of the reverſion competent to the crown upon the *Engliſh* eſtate, which the Duke might thereby be enabled to ſell for the above purpoſe.

Accordingly, an act of parliament was obtained in 1749, and the eſtate ſold for *L.* 63,000 *Sterling*, which ſum was applied towards payment of the Duke's debts.

The late Earl of *Dalkeith*, eldeſt ſon and heir of entail in both eſtates to the Duke, concurred with him in carrying into execution this ſcheme for payment of his debts; and alſo in another ſcheme propoſed

for raiſing *L.* 15,000 *Sterling*, as a portion for Lady *Jean Scot*, the Duke's daughter; and farther, diſcharged the Duke of ſome conſiderable debts which were due by him to the Earl.

While this bill depended in parliament, the Duke executed a deed in favour of the Earl, which proceeded upon a recital "of the Earl's conſent to the ſale of the ſaid eſtate, upon the bill's being paſſed into an act of parliament, and to the application of the price to the payment of all the Duke's juſt and lawful debts, and the ſurplus of the price, if any ſhould be, to pay the ſum of *L.* 15,000, the portion of Lady *Jean Scot*, for which the Earl granted ſecurity at the Duke's deſire:" And farther recited, "That in conſideration of the premiſſes, it had been agreed between them, That the Earl ſhould be ſecured in the fee of the Duke's whole lands and eſtate in *Scotland*, freed of all debts and incumbrances, contracted or charged upon ſaid eſtate, or to be contracted upon the ſame by the Duke in time coming: Therefore the Duke thereby grants and diſpones to the ſaid Earl, and the heirs of his body, the whole eſtate of *Buccleuch*, reſerving to the Duke his liferent thereof," *&c.*: And further, "Diſpones and aſſigns to the Earl, all the arrears of rent, *&c.* which might be due upon the ſaid eſtate by the vaſſals and tenants at the time of the Duke's deceaſe." And by a ſeparate deed, of the ſame date, the Duke, upon the like recital as in the other diſpoſition, and moreover reciting, That the Earl had granted him a diſcharge of *L.* 6446 *Sterling* due by him to the Earl, he ſold and diſponed to the ſaid Earl, the whole furniture, plate and china excepted, of whatever kind or denomination, in any of his the Duke's houſes in *Scotland*; and thereby further aſſigned to the Earl, under the aforeſaid exception of the plate and china, the whole perſonal eſtate in *Scotland* that ſhould belong to the Duke at the time of his deceaſe.

The Earl of *Dalkeith* died in *April* 1750, before the ſale of the *Engliſh* eſtate was fully completed, whereby it became neceſſary to obtain another act of parliament for completing the ſale. This act proceeds upon the recital of the before-mentioned agreement betwixt the Duke and the Earl, and of the ſubſequent conveyances above recited by the Duke, of his eſtate and arrears, and of the furniture, *&c.* in favour of the Earl; and in conſideration thereof, truſtees are named in the act for carrying the ſale of the *Engliſh* eſtate into execution, and for paying off the Duke's debts, as had been agreed by the Earl. The eſtate was accordingly ſold by the truſtees, and the price applied towards payment of the debts of the Duke.

In *April* 1751, the Duke died; and was ſucceeded by the preſent Duke his grandſon, and in his name, being then a pupil, a confirmation was expede, as executor *qua* neareſt in kin, of the arrears of rent and feu-duties due to his grandfather, amounting to *L.* 7650: 17: 5 *Sterling*; and the other perſonal eſtate, being *L.* 566: 13: 10, including plate and china, the value of which amounted to *L.* 426: 19: 11.

A proceſs of multiple-poinding was ſoon after brought, at the Duke's inſtance, wherein ſundry perſons were called, who, as creditors of the late Duke, claimed preference to the ſubjects which had been confirmed by the preſent Duke, and to the furniture; which laſt, the Duke contended, had been ſolemnly delivered to the Earl his father, at the time of the above-recited ſettlement.

The

The debate in this proceſs was reported to the court 13th *January* 1757, and the Lords then " found, That the creditors had right to " the furniture, notwithſtanding the diſpoſition; as alſo, That they " had right to the arrears, notwithſtanding the diſpoſition and confir- " mation; and likewiſe, to the perſonal eſtate in *Scotland*, notwith- " ſtanding the diſpoſition and confirmation; and preferred the credi- " tors on theſe ſeveral ſubjects: But found the faculty to burden " (*i. e.* the *Buccleuch* eſtate with 100,000 merks) was properly and " effectually diſcharged."

The Duke reclaimed againſt this interlocutor, and *pleaded*, That from the whole circumſtances of the before-mentioned tranſaction betwixt his grandfather and father, it appeared to have been a fair purchaſe made by the Earl, for onerous and valuable conſiderations, where he gave a great deal more for payment of his father's creditors than the value of the ſubjects conveyed to him; and therefore that ſuch purchaſe made from a debtor, was not liable to be challenged by his creditors after his death: and that he was intitled to take payment of the debts due to himſelf out of the firſt end of the ſubjects confirmed.

Anſwered for the creditors, The narratives of the deeds before recited, being *inter conjunctos*, do not prove further than as they are aſtructed. They are held, *præſumptione juris*, to be colluſive and fictitious; and the ſuſpicion which the law juſtly entertains of deeds between a father and ſon, when pleaded in bar of lawful creditors, would be entirely fruſtrated, if countenance was to be given to private latent deeds of this kind. And although the creditors do not mean to inſinuate, that any actual fraud was thereby deſigned between theſe Noble perſons, to the prejudice of the juſt and lawful creditors; yet the law can give no faith to the narratives of theſe deeds, when urged as ſufficient to ſupport their oneroſity. 2*do*, From a particular examination of the whole circumſtances of the tranſaction between the Duke and the Earl, the pretended oneroſity of theſe deeds is diſproved; and the Earl was fully recompenſed for any thing done upon his part by the other parts of the ſettlement made by the Duke, without inſiſting on theſe conveyances in oppoſition to the juſt claim of lawful creditors, whoſe payment was never intended to be thereby obſtructed. And, 3*tio*, Thoſe arrears which might be due by the Duke's vaſſals and tenants at his death, and his other perſonal eſtate that might then belong to him, were ſubjects not exiſting at the time of the tranſaction, and to which the Earl could have no right during the Duke's life: And when the title came to take place upon his death, it could only be underſtood *deductis debitis*, which fell to be a natural burden upon theſe arrears, and other perſonal eſtate.

With reſpect to the furniture, a ſeparate ground was founded on by the Earl, *viz.* That the tranſmiſſion of it had actually been completed by delivery to the Earl. The conveyance, which was put into the regiſter, refers to particular inventories which were made up and ſigned, and a receipt granted by the perſon who got the cuſtody of the furniture, with an obligation to be accountable to the Earl for the ſame; ſo that the property thereof was fully tranſmitted to the Earl for very onerous cauſes; and no creditor can have reaſon to ſay, that he truſted the Duke upon the faith of his property in that furniture, which he was thus denuded of in a fair and open manner.

Anſwered

Answered for the creditors, 1*mo*, The pretended onerous cause in the narrative of the conveyance, fails here as well as in the other deeds. 2*do*, This was but a simulate delivery, *retenta possessione*. The furniture remained with the Duke at his death, under the custody of the Duke's servants, who had formerly the charge of it; and therefore must be held, in a question with creditors, as part of the Duke's personal estate at his death.

"The Lords altered, and found, with respect to the household-furniture, That the Earl of *Dalkeith*, and the Duke of *Buccleuch* his son, in his right, was *pari passu* preferable with the other creditors; but adhered to the former interlocutor, with regard to the arrears of rent, and the personal estate." G. C.

Act. *Ferguson*. Alt. *Lockhart*. Clerk, *Forbes*.

N° XLI. 9th *July* 1757.

ANDREW THOMSON, FACTOR appointed by the LORDS upon the estate of CRABSTON,

AGAINST

JOHN ELDERSON.

Powers of a Lords factor to remove tenants.

BEtwixt these two parties this abstract question occurred, Whether a factor upon an estate, sequestrated on account of a competition betwixt two claimants, neither of whom are infeft, can remove a tenant who continues to pay the same rent that he did to the original proprietor?

Pleaded for *Elderson*, the tenant, As the favour of possession is in law very great, so no tenant in possession can be removed but by a person who has a stronger right in him, to wit, the property evidenced by an infeftment. Besides, in the law of *Scotland*, a tack, if clothed with possession, is a real right; and therefore, added to the favour of possession, there is likewise the favour due to a real right, which nothing but a property and a possession can remove.—— Founded on these principles, the law of *Scotland* carries the rule, That only a person infeft can remove, so far, that even an apparent heir cannot remove, although in a manner the same person with his ancestor, drawing the rents, living in the mansion-house, and with whom, at the distance of three years, creditors are in safety to contract.

Any exceptions from the general rule do only tend to strengthen it. An adjudger, with a charge against the superior, may remove; but this is only because a particular statute has made a charge equivalent to an infeftment. A liferenter, by the courtesy, or by the terce, may remove; but this is only because, by the general concession of our law, the continuance of the possession in these cases is deemed to be a continuation of the property which the deceased husband or wife originally had. A tacksman may remove a subtacksman who was

was bound to remove: but this is only becauſe the ſubtackſman cannot come againſt the right by which himſelf holds; and in a queſtion betwixt him and a perſon from whom he derives right, this laſt is, *quoad* him, a *quaſi* proprietor.

Anſwered, A factor appointed by the court of ſeſſion ought to have all the powers of a proprietor infeft, to enable him to manage the eſtate to the beſt advantage; and as he acts under the authority of the ſupreme court, and is tied down by ſtrict regulations, for the benefit of thoſe who ſhall be found to have the preferable right, it would be abſurd to control his power of ſetting the lands to the beſt advantage, on account of a maxim in law, which was calculated only to prevent intruders from removing tenants from the poſſeſſion.

"The Lords decerned in the removing." J. D.

For *Thomſon, Garden.* For *Elderſon, Jo. Dalrymple.*

N° XLII. 9th *July* 1757.

HENRY TROTTER of MORTONHALL,

AGAINST

JOHN HUME of NINEWELLS, and others.

If the proprietor of a ſalmon-fiſhing can erect any thing within his own bounds, by which a ſuperior fiſhing may be hurt?

Henry Trotter brought an action againſt Mr *Hume* of *Ninewells*, and others, 1*ſt*, For aſcertaining the boundaries of his fiſhing on the river *Tweed*; 2*dly*, For obliging them to remove a gallows and ladder erected at the eaſt end of the iſland of *Annabatt*, for the purpoſe of viewing the fiſh in the river, and to demoliſh a bridge between the north bank of the river and the eaſt or lower part of that iſland.

The marches were aſcertained in conſequence of a proof: but with reſpect to the gallows and bridge, it was *argued* for the defenders, That as theſe were erected within the limits of their own property, and were of conſiderable uſe to them, they could not be obliged to demoliſh them, if it were even true, which was not admitted, that they proved hurtful to the purſuer's ſuperior fiſhing; becauſe every man is intitled to uſe his own property as he pleaſes, provided he does not uſe it *in æmulationem vicini*; and the only miſchief the purſuer ſuffers by the gallows is, that the defenders are enabled to ſee the fiſh, and to catch them, before they paſs their boundary.

Anſwered, The bridge in queſtion is 226 feet long. It is ſupported by three ſtone pillars, and thirteen pillars of wood, by which the courſe of the water is greatly interrupted, and the ſalmon frightened from coming up that ſtream; and by the means of ſpeats or land-floods, this channel of the river may, by the obſtruction of this bridge, be much filled up, which would lead the ſalmon into the other branch belonging to a different proprietor. Beſides, this is a navigable river, and therefore an article of public right;—upon which it is not lawful

to erect a private bridge, as is expreſsly decided in the Civil law, *l.* 4. *ff. De flum.*

With reſpect to the gallows and ladder, it is a machine erected eighteen feet and a half high, the water near it is ſhallow, and it is impoſſible it ſhould fail to frighten the fiſh when coming up; and the iſland upon which it is erected is not the ſeparate property of the defenders, but common to them and the town of *Paxton*; and the gallows ſtands within the line of the purſuer's fiſhing.

" The Lords, at firſt, found, That the defenders had no right to " erect a bridge betwixt the banks of the river and the ſaid iſland; " and ordained them to demoliſh the bridge already erected by " them there, and diſcharged them from erecting any bridge there " in time coming: but aſſoilzied them from the concluſion of the " declarator as to the gallows."

But upon a reclaiming petition,

" The Lords aſſoilzied the defenders from the concluſion of the de- " clarator as to the bridge, and adhered as to the gallows." W. J.

Act. *And. Pringle, Scrymgeour.* Alt. *Montgomery.*

N° XLIII. 12th *July* 1757.

JEAN HOME,

AGAINST

ASSIGNEE of LADY WEDDERBURN.

Prior aliment by a mother deemed to be ex pietate, *notwithſtanding a child's ſupervenient fortune.*

JEan Home, with her ſiſter *Iſabel*, had a bond of proviſion from their brother for 5000 merks; but it contained a clauſe, " That the " money ſhould be divided betwixt them by *Ninian Home*, by ſuch " proportions as he ſhould think fit to appoint, by any writ under his " hand, *etiam in articulo mortis.*"

This power of diviſion was never exerciſed by *Ninian Home*. At his death, one half of the 5000 merks fell to *Jean*, by the legal conſtruction of the bond.

From the date of the bond till the death of *Ninian Home*, which was twenty years, *Jean Home*, who had no fortune except the proſpect of this bond, had lived in family with her mother Lady *Wedderburn*.

After the death of *Ninian*, Lady *Wedderburn* claimed aliment as due by her daughter *Jean*, for this intermediate ſpace, in reſpect of her ſupervenient fortune.

In an action betwixt Lady *Wedderburn*'s aſſignee and *Jean Home*, concerning this claim of aliment,

" The Lords found, That Lady *Wedderburn* had no claim of ali- " ment." J. D.

For Aſſignee, *Patrick Home.* For *Jean Home*, *J. Dalrymple.*

N° XLIV.

N° XLIV. 20th *July* 1757.

Major WILLIAM ARNOT of ABBOTSHALL,

AGAINST

Provoſt JOHN CURRIE, and other inhabitants of KIRKALDY.

A thirlage of all grain imported, and tholing fire and water, does not affect ale imported.

THE barony of *Kirkaldy* belonged anciently to the abbacy of *Dunfermline*, and the town of *Kirkaldy* was the borough of the barony.

In 1539, *George*, commendator of the abbacy of *Dunfermline*, diſponed the lands of *Abbotſhall*, part of the ſaid barony, to *Thomas Scot*.

In 1556, the ſaid *George*, commendator of *Dunfermline*, granted a feu-charter of the weſt mill of *Kirkaldy*, with the aſtricted multures of the whole barony, to *George Boſwal*, bearing a *Reddendo* of a feu-duty of 40 bolls of meal, and *L.* 8 *Scots*.

In 1557, the ſame commendator granted, for an onerous cauſe, an obligation to the ſaid *George Boſwal*, That neither he nor his ſucceſſors ſhould build, or allow any mills to be built within the barony, in prejudice of the thirlage to the weſt mill, which then ſeems only to have extended to the *grana creſcentia*.

After the reformation, King *James* VI. as in right of the abbacy, granted a charter of confirmation 1585, to the ſaid *George Boſwal*, of the above rights.

In 1598, Queen *Anne* having a grant of that abbacy, did, with conſent of King *James* VI. her huſband, give a charter to the ſame *George Boſwal* of the ſaid mill, and aſtricted multures, containing a *novodamus* of a new aſtriction or thirlage of the *invecta et illata* within the lordſhip, barony, and borough of *Kirkaldy*, in theſe words: " *Ac* " *etiam cum* particularibus aſtrictis multuris ſubſequen. omnium " generum frugum *illatarum et invectarum*, tam infra integras bondas " totius et integri noſtri dominii *Schyr*, ac baroniæ de *Kirkaldie*, quam " infra dictum burgum et villam de *Kirkaldie*, ac ignem et aquam in " eiſdem patientium, vulgo *tholing fire and water therein*, omni tempore " futuro, viz. in uno bato, vulgo *lie peck*, ex duabus bollis, braſina, " ac uno bato, vulgo *lie peck*, ex ſex modiis omnium aliarum generum " frugum."

In 1636, the above grants were ratified by charter from King *Charles* I.

In 1644, the town of *Kirkaldy* was erected into a royal borough.

About the ſame time, Sir *Andrew Ramſay* purchaſed the eſtate of *Abbotſhall*, and ſoon after acquired from the heirs of *George Boſwal* right to the aforeſaid weſt mill of *Kirkaldy*, with the multures.

In 1725, Sir *John Arnot* purchaſed, at a judicial ſale, both the ſaid eſtate

eſtate and mill; and the proven rent of the latter was no leſs than *L.* 120 *Sterling*.

Sundry attempts were made by the inhabitants of *Kirkaldy* to evade this thirlage, after the erection of the borough into a royal borough; but in theſe they were generally unſucceſsful, as appears from the deciſions collected by Lord *Stair*, 11th *December* 1678, and 24th *November* 1680; and the judgments then given were repeated upon mutual declarators brought in 1685, and again in 1726; when it was alſo found, That the inhabitants could not uſe ſteel mills, without being liable in multure.

Provoſt *William Currie* having lately erected a malting-houſe and brewery at the eaſt end of the town of *Kirkaldy*, but not within the limits of the borough or barony, imported his ale made there into the town, without paying multure to the weſt mill. — Major *Arnot*, the proprietor of that mill, brought an action for payment of abſtracted multures, and damages, againſt Provoſt *Currie*, and certain inhabitants of *Kirkaldy*, who ſold or retailed the ale imported from his brewery.

Pleaded for the purſuer, 1*mo*, The thirlages both of the *grana creſcentia* and the *invecta et illata* to this mill, were purchaſed by a moſt valuable conſideration; and for which a high feu-duty is ſtill payable: ſpecial care was therefore taken to eſtabliſh the ſame in the moſt effectual manner, and to guard againſt every fraud then foreſeen, whereby the ſame might be eluded. Hence the building other mills of any kind was reſtrained: and although the like precaution was not uſed with reſpect to the importation of ale, or many other frauds afterwards attempted, which were not then foreſeen; yet as the abbots had power to conſtitute this thirlage, every fraud inconſiſtent with what was manifeſtly in the view of parties, by the conſtitution of that thirlage, was thereby prohibited, if not in expreſs words, yet by neceſſary implication. 2*do*, If this mill had remained with the convent at this day, the convent, as poſſeſſed of the right of barony, *cum brueriis*, extending over the whole town and territory, could have diſcharged the importation of ale, agreeable to the deciſion in the caſe of the town of *Muſſelburgh*, which originally belonged to the ſame convent, and where it was found, 21ſt *February* 1719, "That the magiſtrates of *Muſſel-*
"*burgh*, as come in place of the baron, had right to reſtrain the im-
"porting of ale not brewn within the liberties of the ſaid borough
"for ſale." — Here every right competent to the baron, neceſſary for maintaining this thirlage to the effect for which it was conſtituted, was transferred to the purchaſer; and therefore the purſuer, as ſtanding in the place of the purchaſer, has the ſame right the convent would have had to ſtop this fraudulent evaſion of the thirlage. 3*tio*, The judgments formerly given reſpecting other evaſions of this ſame thirlage, and a ſimilar deciſion, 11th *December* 1741, in the caſe of *Kelſo*, where it was found, "That in a thirlage of *invecta et illata*, the inhabitants of the
"thirl could not import and conſume grinded malt, without paying
"multure," all prove, that devices to elude a thirlage of this kind, though not expreſsly prohibited, are not allowed, as being under an implied prohibition.

Anſwered for the defenders, 1*mo*, It matters not what price was paid for this mill or thirlage, in a queſtion with the defenders. The feu-duty was fixed before the new thirlage of *invecta et illata* was impoſed. Thirlages

of

of all kinds, eſpecially ſo ſevere a one, extended over a royal borough, are to be ſtrictly explained, and cannot be made more burdenſome on the inhabitants by *implication*. The words of the original grant ſhow, that only *fruges*, or grain, brought in to the thirl, was to pay multure; and ale cannot be conſidered as grain, nor as *tholing fire and water* after it is imported. 2*do*, Whatever power the convent as *barons* might have had of impoſing a new prohibition, ſuch power is not devolved upon the purſuer, who has no right to the *barony* of *Kirkaldy*. The caſe of *Muſſelburgh*, therefore, does not apply, as there the juriſdiction of the *baron* had been expreſsly conveyed. Neither, it is apprehended, would it now be competent for the *baron* of *Kirkaldy* to make ſuch a prohibition, after the erection of the town into a royal borough. And, 3*tio*, The former deciſions, reſpecting this thirlage and the thirlage of *Kelſo*, are not ſimilar, as there the *grain* was imported, and to *thole fire and water* within the thirl, although made into malt, and grinded before the importation.

Moreover, it was lately found, in the caſe of the town of *Perth*, that the magiſtrates and council, as having right to the mills and aſtricted multures, could not prohibit the importation of ale or beer brewed without the liberties.

Replied, The town of *Perth* had no right to the thirlage of *invecta et illata*; neither had its charters given the power of a *baron* to the magiſtrates and council.

"The Lords ſuſtained the defences, and aſſoilzied the defenders "from the proceſs." D. R.

Act. *Rae, Lockhart.* Alt. *D. Græme.*

N° XLV. 23d *July* 1757.

JAMES CAMPBELL goldſmith in *Edinburgh*,

AGAINST

GEORGE CARRUTHERS tenant in *Longboddom*.

Compenſation upon rents, how it operates againſt a debt due to a tenant.

IN 1718, *James Graham* ſet a tack of the half of his lands of *Longboddom* for twenty-one years, at the rent of 300 merks, to his brother Captain *William Graham*; who, in 1723, aſſigned the ſame to *William Carruthers*; and, at the date of the aſſignation, *Longboddom* gave an heritable bond to *William Carruthers* for 4200 merks, payable at the term of *Whitſunday* 1739, when the tack was to expire, with an obligement to infeft in an annualrent of 210 merks out of the above lands, redeemable at the ſaid term; declaring, "That it ſhould be lawful to *Carruthers*, "to retain the ſaid yearly annualrent of 210 merks out of the firſt and "readieſt of the ſaid tack-duty." This tack and heritable bond was thereafter aſſigned to *George Carruthers* the defender.

Longboddom's affairs having gone into diſorder, his eſtate was

ſold by truſtees for his creditors, in 1732, to *Edward Cutler*; who objected to the ſale on account of incumbrances, and in the mean time declined to receive payment from the defender of the ſuperplus tack-duty over his annualrents. Theſe diſputes continued many years with *Edward Cutler*, and *James Campbell*, his repreſentative. At laſt, in 1752, Mr *Campbell* was found liable in payment of the price and annualrents; and in the after decreet of ranking of *Longboddom*'s creditors, *George Carruthers* was ranked for the principal ſum of 4200 merks due to him by the above heritable bond 1718.

The purchaſer *inſiſted*, That the ſuperplus of the tack-duty over the annualrents, being a clear liquid debt due by him, ought to be imputed yearly, as they fell due, in extinction of the principal ſum of 4200 merks, and another perſonal debt due to him by *Longboddom*.

"The Lords, 28th *February* 1756, found, That the ſuperplus rents "owing by *George Carruthers*, after deducing the annualrents of "the debts in his perſon, ought to be yearly applied in extinction "of the ſaid debts."

Pleaded in a reclaiming petition for *George Curruthers*, That by the clauſe in the heritable bond, the tenant was allowed to retain the annualrents out of the tack-duty; but he could not retain the ſuperplus rent for payment of the principal ſum, which was not due till the expiry of the tack: And as he could not plead compenſation, or pretend to retain the rents for payment of his principal ſum, it can as little be competent to the heritor or purchaſer to plead it againſt him. Compenſation muſt in all caſes be mutual, and competent to both parties, or neither. The tenant was bound to pay the ſuperplus of his rent upon demand, without compenſing or retaining; and it would be unjuſt to make him pay intereſt for ſuch ſums, which he was bound to have ready on demand, or to impute them yearly in extinction of his heritable bond, which is equal to making him pay intereſt for the ſame.

Anſwered for *James Campbell*, That the clauſe allowing the tenant to retain his rent for payment of the annualrents, would have been implied, though not expreſſed, and cannot infer a paſſing from compenſation *quoad ultra:* And in all caſes where two debts concur, tho' one of them bears no intereſt, yet compenſation operates *retro*, ſo as to ſtop the intereſt upon the other debt from the time of the concourſe.

"The Lords found, That the ſuperplus rents, after deduction of the "annualrents due to the petitioner, can only apply in extinction "of the debts in his perſon, as at the date of the decreet of rank-"ing."

W. J.

Act. *Pringle, Lockhart.* Alt. *Brown, Ferguſon.*

N° XLVI.

N° XLVI. 27th *July* 1757.

Mrs JEAN HAY, widow of *John Cuthbert* of *Caſtlehill*, CLAIMANT on the eſtate of LOVAT,

AGAINST

His MAJESTY's ADVOCATE.

Whether the production of a deed in a reduction and improbation, and aviſandum made, interrupts the negative preſcription? If an obligation granted to ſubmit the claim upon the deed, be a good interruption?

Hugh Maſter of *Lovat*, in the year 1642, granted bond to *William Paterſon* for 4000 merks of principal, payable at *Whitſunday* 1643. *William Paterſon* aſſigned this bond, in 1647, for a valuable conſideration, to *George Cuthbert* of *Caſtlehill*; who, in 1683, raiſed letters of general charge upon the bond againſt *Hugh* Lord *Lovat*, grandſon of the granter, and thereupon obtained decreet *cognitionis cauſa*; and decreet of adjudication was thereupon led againſt the eſtate of *Lovat* for the accumulate ſum of 15,840 merks.

The Lord *Preſtonhall*, having acquired right to ſundry adjudications for very conſiderable ſums affecting the eſtate of *Lovat*, had expede charters under the great ſeal, and was thereupon infeft; and in 1706, executed a ſettlement of the eſtate in favour of his only ſon *Alexander Mackenzie* of *Fraſerdale*, (who had intermarried with *Æmilia* Lady *Fraſer*, and heireſs of *Lovat*), in liferent, and in favour of *Hugh*, therein deſigned *Maſter of Lovat*, his grandſon, in fee, with ample reſerved powers to himſelf over that eſtate.

In 1708, Lord *Preſtonhall* brought a proceſs of reduction and improbation, and declarator of right, againſt the ſaid *John Cuthbert* of *Caſtlehill*, and ſeveral other creditors who were poſſeſſed of incumbrances upon that eſtate; in which compearance being made for *Caſtlehill*, he produced the original ground of debt, and other deeds relative thereto, before mentioned; with which, and the production for the other creditors, great aviſandum was made, and on the 9th *February* 1709, certification granted *contra non producta*; but with a ſpecial exception from the decreet of certification, of the above-mentioned deeds which had been produced for *Caſtlehill*, although no competition or debate had enſued thereupon; nor were there any further proceedings in this proceſs.

In 1710, *Alexander Mackenzie* of *Fraſerdale* granted his obligation, to cauſe Lord *Preſtonhall*, his father, ſubmit and refer all law-ſuits between *Caſtlehill* and him, and particularly the foreſaid proceſs of reduction and improbation, to the determination of two lawyers therein named; and to cauſe his father implement their decreet-arbitral, under a penalty. This obligation was produced, along with a letter, dated in *November* that year, from *Caſtlehill*, to Mr *John Macintoſh* advocate, with a copy of the foreſaid obligation prefixed, deſiring him to cauſe get the ſubmiſſion ready for ſigning; and the ſubmiſſion made out in the above terms, but not ſigned, was likewiſe produced.

Upon

Upon the forfeiture of the late Lord *Lovat*, Mrs *Jean Hay*, relict of *Caſtlehill*, having right, by progreſs, to the foreſaid bond and adjudication, in 1749 entered her claim upon the forfeited eſtate of *Lovat* for the above-mentioned accumulated ſum of 15,840 merks, and intereſt thereof from *Candlemas* 1683.

Objected by his Majeſty's Advocate, in behalf of the crown, That the bond, and adjudication following upon it, were cut off by the negative preſcription, more than forty years having elapſed from the 1683 to the 1749, without any proper document having been taken upon the debt.

Anſwered, The preſcription was interrupted by the aforeſaid production made for *Caſtlehill* in the proceſs of reduction, improbation, and declarator of right, in 1706; by the great aviſandum made with the writs produced; and by the exception of theſe in the decreet of certification; all of which were ſo many judicial documents taken upon this debt, and ſufficient to preſerve the ſame from this unfavourable objection of the negative preſcription; eſpecially when ſupported by the after proceedings before mentioned with regard to the ſubmiſſion between *Fraſerdale* and *Caſtehill*, which had a ſpecial reference to this proceſs of reduction and improbation, and the title-deeds therein produced; and, all together, they afford the cleareſt evidence, that this claim was not meant to be abandoned.

Replied for the crown, Nothing leſs than an explicit demand by ſome judicial ſtep taken againſt the debtor, at the inſtance of the creditor, can be deemed an interruption in terms of law. The negative preſcription was introduced, not only as a puniſhment to the creditor who neglects to follow forth his right in due time, but likewiſe in favour of the debtor, that the obligations he may have come under may not for ever be kept alive againſt him. In which caſe it very often might happen, that a good defence againſt the obligation might be loſt by the lapſe of time. So that, in order to interrupt the preſcription, it is neceſſary that a legal explicit demand be made by the creditor againſt the debtor who is liable in payment of the debt. The pretended interruptions founded on by the claimant were only made againſt Lord *Preſtonhall*, and his ſon *Fraſerdale*, who were not the perſons properly liable in payment of the debt, being only creditors poſſeſſed of incumbrances on the eſtate of *Lovat*; and as even an action brought againſt either of them would not have been ſufficient to have interrupted the preſcription, far leſs could any private unfiniſhed tranſaction with them have that effect. And, particularly, as *Fraſerdale*, who came under the obligation to ſubmit, was in no ſhape liable for the debt, and had only a mere right of liferent upon the eſtate; ſo he could not burden the ſame to the ſmalleſt extent, nor by any gratuitous voluntary act of his could he keep alive againſt the eſtate a debt, which otherwiſe would have been extinguiſhed by preſcription; and which muſt now be conſidered as appearing under very ſuſpicious circumſtances againſt the crown, after having lain over for near a century.

Anſwered for the claimant, Lord *Preſtonhall*'s charter and infeftment was *ex facie* a title of property to the eſtate, which intitled him to maintain every action competent to an abſolute proprietor; and as ſuch, he had brought the above-mentioned proceſs of reduction; in which *Caſtlehill*'s claim muſt have been cut off by the certification, had

it

it not been produced, and excepted. And this charter of Lord *Preſtonhall*'s became afterwards the cardinal title of the eſtate in the perſon of the late Lord *Lovat*, in whoſe right the crown is now in poſſeſſion. As to *Fraſerdale*, the ſon, although he was but liferenter of the eſtate, yet he was alſo adminiſtrator in law for his ſon, the fiar, and thereby had a good title, on their joint account, to clear the eſtate of this competing incumbrance, by carrying on the proceſs of reduction and improbation; and therefore the compromiſe he made with *Caſtlehill*, in order to ſtay further procedure in that competition, and the obligation which he granted to cauſe his father ſubmit the proceſs, muſt in law and equity have the ſame effect as if the proceſs had gone on, or as if the ſubmiſſion had actually been extended; and muſt in every view be available to ſave this debt from the negative preſcription.

Obſerved on the bench, As aviſandum was made in the improbation with the deeds in queſtion, this was a production made in judgment, and a legal document taken upon the debt. It was entering the liſts in the competition, and an averment that the debt did then ſubſiſt, and was meant to be maintained.

The Lords, upon that original ſtate of the caſe, by two different interlocutors, 12th *February* 1755, and 9th *March* 1756, "ſuſtained "the objection of preſcription; without prejudice to the claimant "to recover further documents to prove interruption."

But afterwards, upon production of the above-mentioned obligation to ſubmit, by *Fraſerdale* to *Caſtlehill*, in 1710, with the other writings relative thereto,

"The Lords ſuſtained the interruptions of the preſcription founded "on, and repelled the objections to the claim." G. C.

Act. *Lockhart*, *Ferguſon*. Alt. *Macqueen*, and Crown-Lawyers. Clerk, *Kirkpatrick*.

N° XLVII. 27th *July* 1757.

CREDITORS of JOHN ROBERTSON,

AGAINST

GEORGE and ROBERT UDNIES, and HENRY PATULLO.

Goods being purchaſed by a perſon inſolvent, if the ſale be reducible?

John Robertſon merchant in *Forres* went to *London* in *November* 1752. In *May* 1753, he brought with him a loading of goods from *Holland*, which he landed at *Tarbatneſs* in *Roſsſhire*. At this time there were ſeveral captions iſſued againſt him at the inſtance of his creditors. He did not come to his own houſe at *Forres*; but went from *Tarbatneſs* to *Gottenburg*, where he took in a cargo, and ſailed to *Hull*.

At *Hull* he wrote a letter, dated 28th *July* 1753, *to Henry Patullo* at *Dunkirk*, ordering certain goods to be ſent by the *William and Mary* ſloop. But this letter was falſely dated, as from *London*.

Henry Patullo ſent the goods, and drew bills for *L.* 601 : 1 : 6, as the value, payable to *George* and *Robert Udnies* at *London*. *John Robertſon* came to *London*, and accepted theſe bills; but of the ſame date he drew bills payable to *John Robertſon junior*, his ſon, for the preciſe ſame ſum, upon *Robert Mackie*, his ſon-in-law, to whom he ſent the cargo; and ſince that time he has never been heard of, but is ſuppoſed to have gone to the *Weſt Indies*.

Several creditors of *John Robertſon* uſed arreſtments in the hands of *Robert Mackie*; who brought a proceſs of multiple-poinding.

George and *Robert Udnies*, and *Henry Patullo*, appeared in this proceſs, and inſiſted, That as *Robertſon* was inſolvent before he commiſſioned theſe goods, and had left his own country to avoid the attachment of diligence, the commiſſioning the goods was fraudulent; and therefore the ſale reducible: and that as they would have been preferable to the arreſting creditors if the goods were *in medio*, they were, for the ſame reaſon, intitled to a preference as to the price due by *Robert Mackie*, as come in place of the goods.

It appeared by the proof, that *Robertſon* owed, at the time he commiſſioned theſe goods, above *L.* 1800 *Sterling*; and had no ſubject to pay this debt, except a houſe in the town of *Forres*, and ſome goods he carried along with him: That a caption had been taken out againſt him in 1752, for *L.* 237, 12*s.*; but the meſſenger had no particular orders to execute it. Another caption was taken out in *July* 1753, for *L.* 200, 6*s.* 6*d.*

It was *contended* for the creditors of *Robertſon*, That though diligence had been taken out againſt him ſome time before he retired; yet that diligence was never executed; and he continued to appear openly: and though he had not been heard of ſince he accepted the bills, yet there was reaſon to believe he had gone out upon an adventure in trade; and his inſolvency could not alone reduce the ſale, which was made long before he retired.

It was *anſwered*, That the bankruptcy in this caſe amounted to the requiſites of the act 1696; inſolvency, caption, and abſconding; but that it was not neceſſary to prove all the requiſites of that ſtatute. The fraud of *Robertſon*, when he knew himſelf to be inſolvent, and was preparing to leave the country, in commiſſioning goods which he had no intention to pay, muſt be ſufficient to reduce the ſale. And this caſe does not come under the rule followed in the caſe of *Joſeph Cave*'s creditors: for here there is convincing evidence of actual fraud intended by the bankrupt.

The creditors of *Robertſon inſiſted*, 2*dly*, That ſuppoſing the claim would have been well founded for recovering the goods; yet it is not equally well founded for recovering the price. In the Civil law, a *rei vindicatio* was neither competent for the price of goods ſtolen, nor for goods bought by money ſtolen, *Voet*, N° 10. & 11. *De rei vindicatione*. And, agreeable to the ſame principles, the court found, 24th *January* 1672, *Boilſtoun contra Robertſon* and *Fleming*, That a merchant having employed a woman to buy linen cloth with his money, which ſhe gave to her ſervant; who bought the cloth, and left it with a third party; in whoſe hands it was arreſted for her debt; the merchant who furniſhed the money, had no preferable right to the cloth, but only a perſonal claim againſt the woman to whom he had given his money.

Anſwered,

Anſwered, It is in ſome meaſure true, that a real action, or *rei vindicatio*, affects only the goods themſelves, not the price of the goods, after they are ſold and transferred to another. This rule, however, applies only to the caſe of *bona fide* poſſeſſors. If a man buys a horſe that was ſtolen from me, I can recover the horſe while in his poſſeſſion; but after he has ſold him, I have no action for the price, but muſt claim the horſe from the preſent poſſeſſor. But the reverſe holds with reſpect to the party who fraudulently deprives the proprietor of his goods, or with reſpect to thoſe who are any wiſe acceſſory to the fraud againſt them: the proprietor has the ſame action for the price after they are ſold, that he had for the goods when they were in their poſſeſſion. This diſtinction is explained by *Voet*, in the paſſage referred to, N° 10. The expediency and favour of commerce may require, that the ſecond purchaſer ſhould be ſafe; but theſe conſiderations cannot operate in favour of creditors, who can be in no better caſe than their debtor.

It is an eſtabliſhed rule, That a proprietor is always preferable to the price of his own goods, while *in medio*, excluſive of the creditors of the party who ſold them, and took the documents in his own name; 9th *June* 1669, *Street contra Hume*; 5th *March* 1707, *Hay contra Hay*; *December* 1751, Lord *Strathnaver contra Macbeath*.

The deciſion 24th *January* 1672, *Boilſtoun*, does not contradict this. In that caſe, a perſon had acquired the property of goods in her own name, with money belonging to another. This property, it was thought, could not be overturned by perſonal latent claims at the inſtance of third parties. But the ſame reaſon does not hold with regard to ſums of money and perſonal rights, in which every claim againſt the debtor may be found effectual againſt his creditors arreſting, without any prejudice to commerce. This diſtinction is explained by Lord *Stair*, *lib.* 1. *tit.* 12. § 17.; and confirmed by two late deciſions; 17th *December* 1748, *Chriſty contra Fairholms*; 6th *March* 1755, Inſurers of the ſhip *Martin* and *Louiſa contra John-George Oſterbie*.

" The Lords found, That *Henry Patullo* is preferable on the price of " the goods ſold by him to *John Robertſon*, ſtill in the hands of " *Robert Mackie*, to the other creditors-arreſters of the ſaid *John* " *Robertſon*." W. J.

For the arreſters, *Montgomery*. Alt. *Ferguſon*.

N° XLVIII. 29th *July* 1757.

Mr JOHN MACLEOD, Advocate,

AGAINST

WILLIAM ROBERTS.

If a barley-mill may be erected within a thirlage?

THE vaſſals of the barony of *Muiravenſide*, belonging in property to Mr *Macleod*, were immemorially aſtricted to the mill of the barony, for all their grain, except bear or barley, peaſe and beans, as to which they

they were exempted by their charters from paying multure for ſuch part as they ſhould have occaſion to ſell, or carry out of the barony, upon payment of a certain ſmall feu-duty; but they were bound " to carry " and grind as much of the grain of bear, peaſe, and beans, at the ſaid " mill, as ſhould remain unſold, and ſhould be neceſſary to grind for " their own daily uſe."

William Roberts, one of the feuers, lately erected a barley-mill upon the lands of *Woodſide*, lying within the barony. Mr *Macleod*, conſidering this to be an incroachment upon the thirl, brought a proceſs againſt *Roberts*, concluding to have the mill taken down and demoliſhed.

Pleaded for the purſuer, It is a point eſtabliſhed by repeated deciſions, particularly the late one of *Urquhart* againſt *Tulloch* of *Tannachy*, That a corn-mill cannot be erected, upon any pretence, within the thirl of another mill.—It is implied in the ſervitude of aſtriction, that the proprietor of the lands aſtricted, as he is bound to grind his corns at the mill, ſo he is reſtrained from building a mill on the ſervient tenement as long as the thirlage ſubſiſts. And accordingly it is laid down in the law-books, That where the heritor of a barony thirled to a mill, feus out a part of the barony *cum molendinis*, he is underſtood to diſcharge the aſtriction: but if no ſuch clauſe is contained in the feu, the liberty of building mills does not paſs to the vaſſal. Nor is it enough, that the perſon who takes it upon him to build a mill within the ſucken of another, offers to find caution, that none of the grain thirled ſhall, at any time, be grinded at this new mill; as this might open a door to daily frauds, and occaſion a multiplicity of law-ſuits. And if it would have been unlawful in the defender to have built a corn-mill on his poſſeſſion, to the prejudice of the mill of the barony, neither can he be allowed to erect a barley-mill; for the difference between the two is very inconſiderable; and nothing is more eaſy than to make the ſame mill anſwer both purpoſes; as, in fact, the purſuer's mill, though properly a corn-mill, has frequently been employed by the vaſſal of the barony for manufacturing barley: and the mill now erected by the defender may, by a trifling alteration in the machinery, which can be done from time to time without the knowledge of the purſuer, be perfectly fitted for grinding meal; and therefore this is equally inconſiſtent with the thirlage, as if the defender had erected a corn-mill within the barony.

Beſides, the defender, as well as all the other vaſſals, are expreſsly obliged by their charters, to carry what *bear* they have occaſion to *grind* for the uſe of the families to the mill of the barony: and the word *grind* cannot be taken in ſo confined a ſenſe as to mean only the manufacturing of bear into meal, but muſt be underſtood to comprehend alſo the making it into barley; otherwiſe an opportunity would be given to the vaſſals of eluding the mill of the barony, by carrying their bear to other mills, upon pretence of making it into barley. Were this to be allowed, it would give occaſion to daily abſtractions; and under pretence of manufacturing barley, they would carry their bear to be grinded at other mills.

Anſwered for the defender, The mill in queſtion is no incroachment upon the thirl. It is built for the ſingle purpoſe of manufacturing bear into barley for the pot, and by its conſtruction cannot grind the ſmalleſt quantity either of oats, bear, or peaſe, into meal, without a very

very conſiderable alteration in the machinery. When ſuch alteration is attempted, the purſuer may complain; and as this alteration can neither be ſuddenly nor ſecretly performed, the purſuer, who lives in the neighbourhood, cannot fail to be ſoon acquainted with it. Beſides, the defender is willing to find ſufficient ſecurity, that no ſuch alteration ſhall be made, and that he never ſhall grind any grain whatever into meal with this mill.

Even ſuppoſing this mill, by its preſent conſtruction, could grind corn into meal; yet as this is only *per accidens*, and will be ſufficiently guarded againſt by the ſecurity which is now offered, the mill ought not, upon that account, to be demoliſhed. The manufacturing bear into barley has been but lately introduced into this country, and deſerves to be encouraged, in place of being cramped by odious ſervitudes.

The defender acknowledges, that by his charter, he is obliged to carry to the mill of the barony ſuch bear as he has occaſion to grind for his family's uſe: but the word *grind* can never apply to the manufacturing of barley; more eſpecially as it has never hitherto been conceived that barley was the ſubject of thirlage, or was comprehended under any aſtriction, however ſevere.

" The Lords found, That a proper barley-mill for grinding *French* " barley may be erected within a thirl; and therefore aſſoilzie " from this action, and decern: but in reſpect of the petitioner's " offer to find caution, that he never ſhall grind any grain whatever " into meal with the mill in queſtion, they ordain him to find " the ſaid caution under the penalty of *L.* 100 *Sterling*." W. J.

Act. *Ferguſon.* Alt. *Wight.*

N° XLIX. 29th *July* 1757.

GEORGE LOCKHART of CARNWATH,

AGAINST

Sir ARCHIBALD DENHOLM and WILLIAM TENNENT.

A mill for lint-bolls and barley erected upon lands aſtricted to another mill.

THE lands of *Croſthill*, belonging to Sir *Archibald Denholm* and *William Tennent*, were thirled to the mill of *Cleugh*, belonging to *George Lockhart*, " for all their grindable corns, ſo far as the proprietors " or their tenants ſhould happen to grind for their own proper uſes al- " lenary."

In 1748, a lint-mill was erected upon the aſtricted lands; and, under the ſame roof, was erected another mill, fitted for ſheeling lint-bolls, and alſo capable of grinding oats, and, with ſome alteration, barley.

An action was brought by Mr *Lockhart* for demoliſhing this mill, as contrary to the aſtriction.

Pleaded in defence, 1*mo*, A mill erected for promoting the trade and

manufactures of the country, ought not to be demoliſhed, though there is a poſſibility that it may be uſed for grinding corn, when ſecurity is offered, under *L.* 100 penalty, not to grind with it any quantity whatever of grain into meal. For this caſe is different from that of a mill built within a thirl, ſolely for the purpoſe of grinding corn. 2*dly*, At any rate, the barley-mill may certainly remain, ſince it requires a different conſtruction from a corn-mill, and cannot be uſed as ſuch without an alteration; eſpecially as the aſtriction in this caſe is of the lighteſt kind, only relating to corns grinded for the proprietor or his tenants uſe; and therefore does not comprehend barley for the uſe of the kitchen.

Anſwered, The mill in queſtion has already been very prejudicial to the thirlage; and though pretended to have been built only for lintbolls, has really been chiefly uſed for grinding oats. It has been frequently decided, that a mill cannot be erected within the thirl, though caution were offered not to grind aſtricted corns; Lord *Stair*, *b.* 2. *tit.* 7. § 23.; 28th *February* 1684, *Macdowal contra Macculloch*, obſerved by *Fountainhall*; and 26th *December* 1752, *Urquhart* of *Burdſyards*. And it can make no difference, that this mill is fitted for other purpoſes, as well as for grinding oats; otherwiſe a pretence would never be wanting to erect mills within a thirl.

2*dly*, If the mill in queſtion were conſtructed in ſuch a manner, that it could ſheel barley alone, there might be ſome pretence to defend it; though it might be doubted, in this caſe, if even the making of barley for the uſe of the proprietor and his tenants is not comprehended under the aſtriction: but this mill, at the ſame time that it is fit for making barley, is alſo fit, by a ſmall alteration, for grinding oats into meal; and is therefore directly contrary to the aſtriction.

" The Lords aſſoilzied the defenders from this action, upon their " finding caution not to grind meal, flour, or malt, in their mill " in time coming, under the penalty of *L.* 100 *Sterling*." W. J.

Act. *Burnet*, *Lockhart*. Alt. *Wight*. Clerk, *Kirkpatrick*.

N° L. 5th *Auguſt* 1757.

CREDITORS of KINMINITY,

AGAINST

JOHN GORDON of CLUNY.

Whether the penalty of an adjudication can be reſtricted to the real expences?

UPon the 2d of *February* 1737, *Sutherland* of *Kinminity* granted an heritable bond to *Thomas Arrot* for *L.* 3000 *Sterling*; upon which he was infeft. This debt *Arrot* conveyed to *John Gordon*; who was alſo infeft.

In *February* 1744, *Gordon* led an adjudication for the debt itſelf, and

L. 415

L. 415 of annualrents then due, and *L.* 600 of penalty, making in all *L.* 4015.

In *June* 1744, the lands of *Kinminity* were ſequeſtrated, and a factor appointed, with the burden of paying to *John Gordon* the annualrents of his principal ſum; which were regularly paid after the ſequeſtration.

When the creditors came to be ranked, Mr *Gordon*, being the preferable creditor, claimed the whole ſum in his adjudication, including the penalty.

The other creditors *objected* to this; becauſe, in that manner, Mr *Gordon* would not only receive his principal ſum, with the *L.* 415 of intereſt, and the expence of his charter, and intereſt of that expence, but alſo *L.* 600 of penalty, and fourteen years intereſt upon that ſum, amounting in all to *L.* 1020, while at the ſame time the other creditors would receive no part of their debts.

In point of law, it was *argued*, That Mr *Gordon* had no juſt ground to lead an adjudication in this caſe, as he was ſecured for his principal ſum and annualrent, and for the expences of his ſeiſin, by his heritable bond and infeftment, by which his became the preferable ſecurity upon the eſtate, except a ſmall debt to Sir *Kenneth Mackenzie*; and he might have recovered his annualrents from the tenants: ſo that his adjudication muſt have been led merely *lucri cauſa*. 2*dly*, At any rate, the penalty ought to be carried no farther, than ſo far as the adjudger was truly out of pocket by expence laid out, which in this caſe amounted only to the expence of his adjudication.

That the end of covenanting penalties, was to ſecure the recovery of the debt; when that end is attained, the claim to the penalty vaniſhes. And accordingly the court is in uſe to reſtrict penalties to the creditor's real expence, even in queſtions with the debtor. In *England* too, it is uſual to reſtrict double bonds, even after the condition is incurred, to the ſingle ſum which was lent, with the intereſt and expence.

That the equitable powers of the court are not taken away by the creditor's leading an adjudication. The ſtatute of *Alexander* II. introducing appriſings, orders the debtor's lands to be ſold, *quouſque fuerit creditori ſatisfactum de ſumma principali, cum damnis, expenſis, et intereſſe.* And the ſtatute 1469, "appoints lands to be ſold to the avail of the "debt, and pay the creditor; or to appriſe the ſaid lands, and aſſign "the creditor to the avail of the ſaid ſum."

When penalties were afterwards inſerted, in order to anſwer the expence of diligence, the court has reſtricted them, when exorbitant; 30th *November* 1680, Earl of *Panmure contra Durham* of *Grange*; and lately, in a queſtion between Sir *Hugh Hamilton* and *Lockhart Wiſeman*; though, in both theſe caſes, the objection was made by the debtor himſelf. And indeed penalties are in general exhauſted by the expence, where the debts are ſmall; but the ſame proportion which is rational in a ſmall debt, becomes exorbitant in a large one. The exorbitancy depends upon the extent of the profit the creditor puts in his pocket, and not upon the proportion between the penalty and the principal ſum.

Anſwered, The adjudication was neceſſary, as there were three years intereſt due to Mr *Gordon*; and there were prior inhibitions and adjudications upon the eſtate; and as the law then ſtood, he muſt have paid, though

though the preferable creditor, a proportion of the expence of a ranking and ſale; and beſides, he was intitled by law to adjudge his debtor's eſtate, if he did not get payment of his money.

This objection to the penalty is extremely new; and there is no inſtance where, without any objection to the validity of the diligence, or to the proportion of the penalty, the claim of a creditor to be ranked for it was ever objected to.

After an adjudication, the lands are not *redeemable*, except upon payment of the accumulate ſum, with the intereſt due upon it. Poſterior adjudgers, after year and day, carry nothing but this right of redemption, and the ranking and ſale of the eſtate does not vary their intereſts.

In the caſe, 30th *November* 1680, Earl of *Panmure*, the penalty was exorbitant, being beyond what was ſtipulated in bonds at that time; and in the late caſe of Sir *Hugh Hamilton*, ſeveral nullities were objected to the adjudication.

By the Civil law, there was no modification of conventional penalties, as being introduced in order to liquidate the *intereſſe*. Penalties in bonds were introduced for the ſame reaſon: and though in practice they are reſtricted to the expence where the debtor only fails in payment at the day; yet if the creditor is obliged to adjudge, the penalty cannot be reſtricted; becauſe the creditor is obliged to take land for his money; which is the reaſon given in the act of parliament 1672: and in a caſe, 30th *June* 1737, *Watſon* of *Saughton contra James Baillie*, the court found, That a ſpecial adjudication could not be redeemed but upon payment of a fifth part more.

It is difficult, if not impoſſible, to determine the damage which a creditor may ſuſtain by being obliged to take land for his money, or to wait the event of a ranking and ſale; but it is proper that a general rule ſhould be eſtabliſhed, of allowing, in ſuch caſes, a certain proportion of the debt in name of penalty. In ſome caſes, this penalty may not be equivalent to the creditor's loſs; in other caſes it may exceed it; but this is of leſs conſequence than to follow a different rule for each particular caſe.

" The Lords found, That *John Gordon* muſt be ranked for his whole " accumulate ſum, including the penalty; reſerving the reſtriction " of the penalty till the making out the ſcheme of diviſion, that " the creditors are to draw their money." W. J.

For the creditors, *Ferguſon*. Alt. *Johnſtone*, *Burnett*. Reporter, Lord Juſtice-Clerk.

N° LI.

N° LI. 10th *Auguſt* 1757.

JAMES GORDON of BADENSCOTH,

AGAINST

ALEXANDER HALL, his TENANT.

Nullities of a tack ſupplied by the tenant's poſſeſſion.

A Letter being addreſſed to an heritor, who was minor at the time, by a former tenant, agreeing to become bound to accept of a tack of the ſame farm for thirteen years, and to pay a rent which was acknowledged to exceed the old rent in two particulars, *viz.* eight feet of peats, and a ſtone of butter; this was found equivalent, againſt the heritor, to a tack, though the letter bore no date; becauſe it was proved, by the heritor's declaration, that the date of the letter was five years before; and though his curator was not preſent at receiving the letter, yet he himſelf became major ſoon after, and received the additional rent contained in the letter for four years, during which time, as he acknowledged, the tenant poſſeſſed upon no other title than the letter. W. J.

Act. Burnett.

N° LII. 11th *Auguſt* 1757.

WALTER STIRLING merchant in *Glaſgow*,

AGAINST

PATRICK NISBET merchant there.

Inhibition recalled upon a debt not yet payable.

William Stirling granted bond to *Janet* his daughter, the wife of *Patrick Nisbet*, for *L.* 250, to be paid at the firſt term after the death of *Eliſabeth Murdoch*.

He afterwards conveyed his whole eſtate to *Walter*, his only ſon, declaring, "That *Walter*, and the ſubjects conveyed to him, ſhould be "affected with the payment of his juſt debts, and the proviſions made "in favour of *Janet* and the other children."

Patrick Nisbet, after the death of *William Stirling*, uſed inhibition and arreſtments againſt *Walter Stirling*, for ſecurity of this ſum, which was not payable till the death of *Eliſabeth Murdoch*, an event which had not then happened.

Walter applied to the court to have the inhibition recalled, and the arreſtments looſed without caution; and *argued*, That this was a debt

not yet due; and therefore that no diligence could be taken out upon it, unleſs the debtor were *vergens ad inopiam*; which could not be pretended in this caſe, as *Walter*'s affairs were in a good ſituation: That, of old, the diligence of inhibition was not allowed to go out till probable evidence was given, that the creditor had cauſe to apply for it: That, in later times, the diligence had been allowed to paſs in courſe; but the court were ſtill in uſe to diſcharge it, upon application made, where it appeared to be unneceſſary or malicious.

Anſwered, It was in this caſe the intention of *William*, the father, to make the *L.* 250 a real burden upon the eſtate; for it is made a burden upon the deed granted to the ſon, though the clauſe is not conceived in ſuch a manner as to be effectual for the purpoſe intended; *Patrick Nisbet* had therefore a title to inſiſt upon having it made a real burden, agreeable to the father's intention. *Walter Stirling* has refuſed to do this voluntarily; and therefore inhibition becomes a proper ſtep, without being obliged to alledge that the debtor is *vergens ad inopiam*.

"The Lords recalled the inhibition, and looſed the arreſtments." W. J.

For *Walter Stirling*, *Ferguſon*. Alt. *Miller*. Clerk, *Gibſon*.

N° LIII. 11th *Auguſt* 1757.

Dr GREGORY,

AGAINST

HELEN BURNET.

Inhibition refuſed to be recalled.

AN inhibition was executed againſt Dr *Gregory*, upon an obligation granted by him in favour of *Helen Burnet*, his brother's relict, by which he was bound to infeft her in his third of the lands of *Blairtoun* and *Hopſhill*, for ſecurity of her annuity of 600 merks; but under a condition, That if he ſhould happen to ſell theſe lands, ſhe ſhould be obliged to renounce her liferent upon his granting her a new ſufficient ſecurity.

Dr *Gregory* applied to have the inhibition recalled upon theſe reaſons: That he had an intention to ſell the lands, in order to buy others; and therefore her infeftment would only occaſion an imbarraſſment and additional expence: That he had offered to infeft her in a fiſhing let at *L.* 85 *per annum*; or to give her the beſt perſonal ſecurity in *Scotland*; and the ſituation of his affairs was not ſuch, as to expoſe her to any hazard by the delay.

Anſwered, The intention to ſell the lands was too vague a reaſon for delaying the ſecurity. The infeftment in a precarious ſubject, the fiſhing, was not equivalent; in which ſubject the Doctor was, beſides, bound to infeft his mother for her annuity; and as the fiſhing was a fee limited to males, her infeftment in it would require the imbarraſſment of truſtees. She was not bound to accept of the beſt perſonal ſecurity, which was not equal to the ſecurity of land. The Doctor was in good circumſtances; but he was bound to make ſuch large proviſions

ſions to his wife and children, that, in the event of his death, a competition of creditors might ariſe.

" The Lords refuſed to recal the inhibition; and found the Doctor " liable in expences." W. J.

For the Doctor, *And. Pringle.* Alt. *Garden.* Clerk, *Home.*

N° LIV. 14th *November* 1757.

JOHN STEVENSON AND COMPANY,

AGAINST

ROBERT MACNAIR, and two other partners of the ARRAN FISHING COMPANY.

In a proceſs againſt a company, either the whole company or the directors muſt be called.

BY the contract of copartnery conſtituting the *Arran Fiſhing Company*, a ſhare in the copartnery was declared to be *L.* 50, and the capital ſtock to be *L.* 2000; and that no partner ſhould have more than four ſhares.

It was further agreed, That the trade ſhould be carried on by certain directors therein named; and by one clauſe the directors are " impowered to give ſuch orders and directions concerning the ſtock, and " management of the whole of the company's affairs, as to them ſhall " ſeem meet, which ſhall be binding on all the partners to the extent of " their reſpective ſubſcriptions, until the ſame (*viz.* orders and directions) ſhall be altered by a general meeting;" which was confirmed by another clauſe, in theſe words: " Provided nevertheleſs, that nothing " herein contained ſhall be underſtood to import a power to the directors, or any general meeting, to compel any partner or ſubſcriber " to pay or contribute any more money to the ſtock than the ſum " by him ſubſcribed."—And by two other clauſes it was ſtipulated, " That none of the company's ſtock ſhould be liable to be affected " with the private debts of any of the parties, or to diligence at the " inſtance of any of their creditors, ſo as to give the creditors uſing " ſuch diligence any other right to the ſubject than the price at which " his debtor's ſhare ſhall be ſold for at public roup: That in the event " of any partner's ſhare being affected by legal diligence, and in the " event of the death of any partner, and more perſons claiming right " to his ſhare than one, or the right of that one affected by diligence, " it ſhall be in the power of the directors, or general meeting, to ſell " the ſhare ſo affected by diligence, or that ſhall be claimed by " more perſons than one, by public roup; and the company to be only " accountable to thoſe having right to ſuch a ſum as the ſhare ſhall be " ſold for at the roup."

Stevenſon and company, of the rope-work of *Port-Glaſgow*, having furniſhed ropes to the extent of *L.* 72, to the company, purſued *Macnair*, and two other private partners of the company, for payment.

Objected

Objected for the defenders, 1*mo*, All parties having intereſt are not called: either the whole partners, or at leaſt the directors, as repreſenting the whole partners, ought to have been made defenders. 2*do*, The defenders could not be liable in their private fortunes. From the contract it appears, that the preſent was not an ordinary ſociety, but was an agreement of a number of gentlemen to carry on a new branch of trade, by a certain limited capital, compoſed of diſtinct and equal ſhares; that to keep theſe ſhares always ſeparate, they were withdrawn from the common rules of ſucceſſion and attachment; that the ſhares were to be under the direction of certain perſons, ſeparate from the other funds of the ſubſcribers; and in ſuch a manner, that nothing affecting them ſhould affect their other funds.—Such ſocieties are well known in trading nations, and in them it was never dreamed, that the private funds of the partners could be attached for the debts of the company. The *French* are beſt acquainted with, and have derived the greateſt advantages from partnerſhips of this kind, of any nation in *Europe*. *Savary*, in his *Parfait Negociant*, *ſeconde partie*, *l.* 1. *c.* 1. in giving an account of them, called by him, *Societez en commandites*, ſays, *p.* 24. " Les marchands, et autres perſonnes qui feront des ſocietez en " commandites, doivent bien prendre garde de mettre tousjours cette " clauſe dans l'acte, Qu'ils ne ſeront tenus à aucune dette de la ſocieté; " et qu' en cas de perte, ils ne pourront perdre que juſques à la concur- " rence des ſommes qu'ils y auront miſes." And, in giving the form of ſuch a contract of copartnery, *p.* 52. the 23d article of the contract is expreſſed in theſe words: " Toutes les dettes faites et créées, tant par " la maiſon de *Paris*, que celle de *Lyon*, ſeront aux riſques, perils, et " fortunes, de la dite ſocieté, et ſeront ſupportées SUIVANT LES PARTS " ET PORTIONS QUE CHACUN DE NOUS AURA EN ICELLE; ſuivant " qu'il ſera dit ci-apres. Neanmoins,—ne ſera tenu à aucune perte " que juſques à la concurrence des profits."

The Lords waved giving judgment on this laſt defence; but " Aſſoilzied the defenders, in reſpect all parties having intereſt were " not called into the field." J. D.

Act. Lockhart. *Alt. J. Dalrymple.*

N° LV. 15th *November* 1757.

Hearing in preſence.

YOUNGER CHILDREN of HUGH CAMPBELL,

AGAINST

His ELDEST SON.

Father cannot, on deathbed, grant bonds of proviſion to younger children, to affect the heir.

Hugh Campbell purchaſed the lands of *Pencloe*, of 600 merks yearly rent, from his brother *Andrew*, for 17,600 merks: he paid the price

price, and received a diſpoſition; but no infeftment followed. This purchaſe exhauſted all the fortune he had.

Six months after, *Hugh* being upon deathbed, and ſeeing that he had no other fund for proviſions to his younger children, cancelled the diſpoſition, took an obligation from *Andrew* to ſell the lands for behoof of *Hugh* and his heirs, and granted reaſonable bonds of proviſion to his younger children, to be paid out of the price of the lands.

The tutors of the heir having quarrelled this tranſaction on the head of deathbed, the Lords, abſtracting from the circumſtances of the caſe, ordered a hearing at the bar upon this general point, Whether a man could, upon deathbed, grant rational proviſions to his younger children, ſo as to affect the land-eſtate deſcending to the heir?

Pleaded for the heir, The words of the *Regiam Majeſtatem*, *lib.* 2. *cap.* 18. intitled, *De donationibus terrarum*, § 7. and 9. are, "Licet au-" tem, generaliter, cuilibet liceat de terra ſua rationabilem partem, " pro voluntate ſua, cuicunque voluerit, in vita ſua donare; in " extremis tamen agenti, hoc nulli hactenus eſt permiſſum. —— Unde " præſumeretur, quòd ſi quis in infirmitate poſitus quaſi ad mortem, " terram ſuam diſtribuere cœperit; quod in ſanitate facere noluit, hoc " potiùs ex fervore animi, quàm ex mentis deliberatione, eveniret." And the words of the laws of *William* the Lion, *cap.* 13. are, "Nullus " poteſt, in lecto ægritudinis ſuæ de qua moritur, alienare aliquas terras " quas hæreditarie poſſidet, in comitatu vel in burgo; nec etiam aliquas " terras quas acquiſivit in ſanitate ſua; nec alicui dare aut vendere ab " hærede ſuo, niſi fortè ære alieno ſit oneratus; propter quod, de ne-" ceſſitate, ipſum oporteat terras vendere vel impignorare; communiter " enim dicitur, Quod neceſſitas non habet legem; ubi hæres ejus nec " poteſt, nec vult, eum de ſuo debito relevare."

Originally it was the law of almoſt all nations, That not man, but God only could make an heir; and hence it was our moſt ancient law, That even *in liege pouſtie* a man could not diſpoſe of his heritage. Afterwards indeed this came to be altered, and he was allowed to diſpoſe *in liege pouſtie*; but ſtill he was incapacitated to hurt his heir upon deathbed. The principles, therefore, on which the law of deathbed is founded are, the remains of the ancient favour to the heir, the ſuppoſed incapacity of a dying man to judge aright of ſettlements, and the danger of dying perſons being teaſed in their laſt moments by thoſe around them.

As ſuch is the preciſe rule of the common law, laid down in the *Regiam Majeſtatem*, and of the ſtatute law, laid down in the law of *William* the Lion, and as that rule has not been altered by any ſubſequent ſtatute, it is not in the power of the court of ſeſſion to infringe upon it. That court is to apply the law, not to make the law. The court of ſeſſion has no pretorian powers. The pretor was a magiſtrate, as well as a judge, who derived his power immediately from the people, and ſucceeded the conſuls in their judicative power; as they again ſucceeded the kings in that part of their regal office. This account of the origin of the office, gives the reaſon, why the pretor not only acted the part of magiſtrate and judge, but of lawgiver, giving out laws under the name of *edicts*, according to which he adminiſtered juſtice. The judicial part he committed, in ordinary caſes, to certain judges under him, called *judices pedanii*, who were judges, and nothing more;

and therefore had not the power of executing their own ſentences, which were executed by the magiſtrate who named them. Theſe were the proper judges known to the *Romans*; and that part of the trial which was carried on before them, was only, in their language, called *judicium*. This was the power of the *Roman* pretor. On the other hand, the judges of the court of ſeſſion are not magiſtrates, but judges, having a delegated power from the chief magiſtrate of the country; and who himſelf, by our conſtitution, hath not the power of ſuſpending or diſpenſing with the laws, much leſs of abrogating them. And even the ſentences pronounced by them they cannot execute; but, like the ſentences of thoſe judges juſt mentioned among the *Romans*, they are executed in name of the king, or chief magiſtrate, from whom the court derives its authority. And although, like thoſe judges, the court does not judge under the reſtraint of a *formula* in every particular caſe, yet it has a general *formula*, namely, the law of the country, from which it cannot in any caſe depart. Even the *Roman* pretor, great as his power was, did not take upon him directly to abrogate the eſtabliſhed laws; but, on the contrary, treated them with the greateſt caution and reſpect, rather eluding, and breaking the force of them, by circuits and devices, than directly repealing them: nor can any example be given, where the pretor went ſo directly in oppoſition to the eſtabliſhed law, as it is propoſed the court of ſeſſion ſhould do in this caſe.

Anſwered for the younger children, The words of the two laws bar only gratuitous alienations to the prejudice of the heir, but not rational deeds to his prejudice. The chapter of the *Regiam Majeſtatem* founded upon, is intitled expreſsly, *De donationibus terrarum*: but then a law founded on utility, and which promotes the common intereſt, may be extended beyond the words, to fulfil the purpoſe of the legiſlature; and the judgment may fall to be pronounced in equity, and not in ſtrict law. In this view, the preſent queſtion is, Whether the law of deathbed ought to be ſo far extended by a court of equity, as to annul a bond of proviſion granted by a man upon deathbed?

When the principles of equity are applied, they will be found to vary with the merits of the bonds. That the law of deathbed ought to be extended againſt bonds merely gratuitous, ſeems obvious; for a law prohibiting alienation upon deathbed, ſo far as prejudicial to the heir, could never intend to lay the eſtate open to be ſwallowed up by a gratuitous bond: and indeed, were this permitted, the law of deathbed would avail very little. A bond merely voluntary, or gratuitous, granted on deathbed, will not be preſumed, in terms of the law, to be done deliberately, or by good advice: it will be preſumed to be either the effect of undue influence upon a man in trouble of mind, or of an unjuſt purpoſe, to defraud the heir; and, in either view, it ought to be annulled.

A bond granted on a rational conſideration, is in a very different ſituation. It admits not of either of the two preſumptions now mentioned. Its rationality, which is a juſt motive for granting it, excludes them both. There can lie no preſumption, that it was elicited by undue influence, and as little that it was done to defraud the heir. There

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is not the ſlighteſt foundation in the ſpirit of the law of deathbed, more than in the words, to cut down ſuch a deed.

Thus a bond of proviſion, which is immoderate, and beyond the circumſtances of the granter, ought to be cut down; becauſe it either has been elicited by undue influence, or muſt have been intended to the heir's prejudice. But a moderate bond of proviſion cannot admit of either of theſe preſumptions: it has a moſt rational motive; not only humanity and parental affection, but even parental duty; for he that provideth not for his family, is worſe than an infidel.

This doctrine takes off the force of the argument drawn from the danger of mens doing irrational deeds when they are incapable of judging for themſelves. The authority of the court is aſked to ſupport rational, and not irrational bonds of proviſion.

It takes off too the force of the argument drawn from the danger of dying perſons being teaſed to execute ſettlements. It will require little teaſing, to get a man to grant rational bonds of proviſion to his children; and it cannot be called undue influence, to aſk a man to do what he ought to do.

It takes off too the force of the argument, That the court have no power to ſupport ſuch bonds, even though they thought it right to do it. The court of ſeſſion is either a court of ſtrict law, or a court of equity. If it is the former, it cannot cut down rational bonds of proviſion; becauſe, not being gratuitous alienations of land, they are not within the ſtrict letter of the law of deathbed: if it is the latter, it would appear to be the province of the court, to beat down bonds of proviſion when they are exorbitant, and contrary to equity, but to ſupport them when they are moderate, and according to it.

" The Lords found, That the father could not grant the proviſions " in queſtion to his younger children upon deathbed." J. D.

For heir, *Burnett*, *Advocatus*, *Ferguſon*. Alt. *Jo. Dalrymple*, *Miller*, *Lockhart*.

N° LVI. 15th *November* 1757.

GEORGE FULLARTON of BARTONHOLM,

AGAINST

CHARLES SCOT of BAVELAW.

Effect, as to the right of the husband, of a ſupervenient heritable ſecurity or adjudication for a moveable debt due to a wife.

William Scot of *Bavelaw* having died in the 1691 without iſſue, the ſucceſſion of his heritable eſtate devolved upon *Charles Scot* of *Bavelaw*, his brother; and the right to his executry fell to his five ſiſters; four of whom were married, and one of them, *viz. Agnes*, to *Adam Fullarton* of *Bartonholm*.

Charles Scot, ſoon after his brother's death, with conſent, as it would ſeem, of his ſiſters, confirmed himſelf executor to his brother; and, *inter alia*, gave up *L.* 2820 *Scots*, as the bygone annualrents of two bonds

bonds which had been granted to *William Scot*, ſecluding his executors, for *L.* 1000 each, by *Richard Lauder* of *Hatton*; and having afterwards made up titles, by general ſervice, to theſe two bonds, led an adjudication, in 1694, againſt the eſtate of *Lauderdale*, for payment of the accumulated ſum of *L.* 5524 *Scots*.

In 1695, *Charles Scot* entered into a contract with his ſiſters, and their reſpective huſbands; whereby, upon a narrative of his brother *William*'s having intended to divide 4000 merks in different proportions therein named, amongſt him and his ſiſters; which intention he was willing to fulfil; he therefore aſſigned and diſponed to his ſaid ſiſters certain debts therein ſpecified, partly heritable, partly moveable; particularly the foreſaid two bonds due by *Lauder* of *Hatton*, to be divided amongſt them, according to the proportions mentioned in the deed, deducing the expence that might be laid out by him in recovering the ſame. On the other hand, the ſiſters and their huſbands renounced, in favour of *Charles*, all right they might have to the office of executry, or to the moveables of *William*, accepted of the ſaid diviſion in lieu thereof, and impowered *Charles* to proſecute all neceſſary diligence for recovery of the above debts; with a proviſo, That what further ſhould be recovered, beyond the extent of the 4000 merks, ſhould be divided according to the ſame proportions.

In 1701, *Charles Scot* diſponed thoſe debts mentioned in the contract 1695 to Sir *Alexander Brand*, Mr *Michael Lumiſden*, and *Adam Fullarton*, (the huſbands of his three ſiſters), their heirs and aſſignees, to the end they might recover the foreſaid ſums, and divide the ſame according to the proportions mentioned.

Soon after this *Charles Scot* died, and was ſucceeded by *William Scot* of *Bavelaw*, advocate, his ſon and heir.

The truſtees above named, by virtue of the conveyance from *Charles Scot*, having taken meaſures with regard to all the debts contained in the contract 1695, (excepting the two debts due by *Lauder* of *Hatton*), in 1708 made a diviſion of the ſums recovered, according to the proportions mentioned in the contract 1695.

About the year 1720, *William Scot*, as in right of *Charles* his father, brought an adjudication againſt the Earl of *Lauderdale*, for payment of the foreſaid two bonds due by *Lauder* of *Hatton*; and the Earl of *Lauderdale* having propoſed to tranſact this debt, by granting his bond of corroboration for the ſame, *William Scot*, in order to intitle him to make the tranſaction, entered into a contract with the ſeveral parties intereſted in this debt, *viz.* the repreſentatives of his aunts, and particularly *Robert Fullarton* writer to the ſignet, as factor for *William Fullarton* of *Bartonholm*, only ſon of the above-named *Adam Fullarton* and *Agnes Scot*; and from them obtained a commiſſion, impowering him to tranſact with the Earl, and accept of the bond of corroboration. This contract proceeds upon a recital of the agreement 1695; and a particular clauſe is added, whereby it is agreed, That the ſum for which the Earl was to grant bond, ſhould be divided into certain proportions, agreeable to the rights ariſing from the former contract; particularly *two eighth parts are declared to appertain to William Fullarton of Bartonholm, as deriving right, by progreſs, from Agnes Scot his mother.*

In conſequence of this contract and commiſſion, the Earl of *Lauderdale* granted his bond of corroboration to the ſaid *William Scot* for the principal

principal ſum and annualrents contained in the foreſaid two bonds, accumulated into the principal ſum of *L.* 7638 *Scots*, payable at the term of *Whitſunday* 1720; and *William Scot*, upon receiving payment of the annualrents due thereon, divided the ſame among the parties having right, conform to their ſeveral intereſts.

The Earl of *Lauderdale* having failed in payment of this bond, *William Scot* proceeded in his adjudication; and, in the 1729, obtained a decreet of adjudication againſt the Earl's eſtate for the accumulated ſum therein mentioned. And thereafter *Laurence Scot* of *Bavelaw*, the ſon and heir of the ſaid *William Scot*, with concurrence of the other parties above mentioned intereſted in this debt, received payment of an agreed ſum from the preſent Earl of *Lauderdale*, in ſatisfaction of the debt.

The ſaid *Robert Fullarton* writer to the ſignet, as having right by a general diſpoſition from *William Fullarton* of *Bartonholm*, brought an action againſt the ſaid *Laurence Scot* of *Bavelaw*, for payment of *William Fullarton*'s proportion of the ſums paid by the Earl of *Lauderdale*; and *Laurence Scot* having brought a multiple-poinding againſt all parties concerned, *pleaded*, by way of defence, That this debt due from the family of *Lauderdale*, having been rendered heritable by the adjudication in 1694, led by *Charles Scot* of *Bavelaw*, the proportion thereof aſſigned to *Agnes Scot* by the contract 1695, did not fall to *Adam Fullarton*, her huſband, *jure mariti*, but belonged to herſelf, and deſcended to her heirs; and that as no title by ſervice had been made up to her by the ſaid *William Fullarton* her ſon, the purſuer's author, it now deſcended to *Laurence Scot*, the defender himſelf, as her heir; and that he had right to retain the ſame.

Both parties died during the dependence, and the proceſs was renewed betwixt the purſuer and defender.

Pleaded for the purſuer, 1*mo*, The claims competent to *Charles Scot*'s ſiſters before the contract 1695, being ſuch as fell to their huſbands *jure mariti*, the nature of them was not altered by the contract 1695, which was only intended to make thoſe claims effectual, and not to alter or impair the rights of the huſbands; and therefore that *Agnes Scot*'s ſhare in that contract belonged to *Adam Fullarton* her huſband, and afterwards to *William Fullarton*, as executor to his father. 2*do*, That the right veſted in *Agnes Scot* by the contract 1695, to call *Charles Scot* to account for the payments he ſhould recover out of the debts mentioned in that contract, was a perſonal and moveable right, and not an heritable right; and therefore that that right was veſted in *William Fullarton* her ſon, both by the contract 1720, whereby *William Scot* became bound to pay her ſhare to *William Fullarton*, and by *William Fullarton*'s having been confirmed executor to his mother. 3*tio*, That *William Scot* having, by the contract 1720, become explicitly bound to pay this ſhare of the Earl of *Lauderdale*'s debt to *William Fullarton*, as having right thereto, could not afterwards object to *William Fullarton*'s right; and that this objection is as little competent to the defender, the heir and repreſentative of *William Scot*.

Anſwered for the defender, The principle upon which the whole of the purſuer's argument is built is not well founded, *viz.* That an acceſſory heritable ſecurity taken, or the acquiſition of an heritable eſtate made, after marriage, for a debt due to the wife ſimply, moveable, and

falling under the huſband's *jus mariti*, would not exclude the huſband's right. For, if a huſband and wife concur in taking an heritable ſecurity for a legacy, or purchaſing in her name an heritable eſtate, with any debt falling *ſub jure mariti*, it is clear, that the huſband's conſent to convert ſuch debt into an heritable eſtate, muſt, in the eye of the law, be held a donation or gift on his part; which though it might be revoked by him, or reduced by his creditors; yet, if not revoked or reduced, muſt ſtand good, and the heritable right deſcend to the heirs of the wife, and not belong to the executors of the huſband.

Obſerved on the bench, The legacy intended by *William Scot* to his ſiſters in 1691, was plainly the foundation of this claim; therefore the ſhare of each of the ſiſters was a ſubject which would fall under the *jus mariti*, ſeeing the ſecurity granted for it came in place of the legacy, and muſt be regulated by the ſame rules. And all the future tranſactions ſhow, that it was ſo underſtood, particularly the commiſſion to Mr *William Scot* in 1720, which was equivalent to an obligation to pay the proportions there ſettled.

On the other hand, it was *obſerved*, That by the expreſs terms of the contract 1695, there appeared to have been no legal claim for a legacy; therefore the ſubjects ought to remain, and be regulated according to their proper nature: That the right to thoſe debts was clearly *in hereditate jacente* of *Agnes Scot* at her death; and therefore could not tranſmit without a ſervice to her; nor could the commiſſion in 1720 diſpenſe with the neceſſity of making up proper legal titles.

" The Lords preferred *George Fullarton*, purſuer, to *Charles Scot*, de-
" fender, for the purſuer's proportion of the ſums paid by the
" Earl of *Lauderdale* to *Laurence Scot* of *Bavelaw*; and therefore
" found the ſaid *Charles Scot* liable for the ſum of *L.* 217 : 7 : 6
" *Sterling*, being the purſuer's proportion of the ſaid ſum uplifted
" from the Earl of *Lauderdale*." G. C.

Act. *And. Pringle.* Alt. *Montgomery.* Clerk, *Home.*

N° LVII. 15th *November* 1757.

WILLIAM DOUGLAS and PATRICK LINDSAY merchants in *Edinburgh*,

AGAINST

ALEXANDER BROWN merchant in *Edinburgh.*

Bill bearing intereſt from the date found null.

IN the ranking of the creditors of *Robert Brown* of *Whitecroft*, *Alexander Brown* produced, as his intereſt, a bill for *L.* 76 : 5 : 5 *Sterling*, dated in 1725, accepted by the common debtor, payable at a certain day, and bearing in it a ſtipulation of *intereſt from the date.* It appeared to have been taken for the amount of an account of goods, which was diſcharged at the time of the acceptance. Inhibition was executed upon this bill in the 1726, and followed by an adjudication.

Objected

Objected by *Douglas* and *Lindsay*, competing creditors, That the ſtipulation of intereſt from the date contained in the bill, renders it void and null; becauſe bills are not intended to be ſubſiſting ſecurities for ſums lent out upon intereſt, but are conſidered as bags of money paſſing like ſpecie from hand to hand. The law has provided, that they ſhall bear intereſt againſt the accepter from the term of payment, only *in pœnam* of his neglect of making payment at the preciſe term, and no intereſt is, *ex lege*, due upon them, when accepted, between the date and the term of payment, as till then the accepter is not *in mora*. Where other ſtipulations are intended, the preciſe form of executing and teſting an effectual obligation is directed by ſtatute; and as bills, whether foreign or inland, make a ſingular exception from the general rule, wiſely calculated to prevent frauds and forgeries, their privilege is loſt by any material deviation from the known and eſtabliſhed form of bills uſed in this and other countries: and, *a fortiori*, ſhould it be ſo in a caſe like this, where a condition is introduced inconſiſtent with the very end and intention of bills.

Anſwered for *Brown*, 1*mo*, The bill in queſtion was accepted for full value received; and it would be very hard to forfeit a lawful onerous creditor, on account of a trivial miſtake in drawing the bill. 2*do*, It has all the known requiſites of a bill *jure gentium*; and therefore cannot be annulled without the force of a ſtatute. 3*tio*, This addition to the bill cannot change it into a writ of another kind, not intitled to the privileges of bills; 1*mo*, becauſe there is nothing unlawful in a creditor's taking intereſt from the date of his ſecurity on a debt then ſubſiſting; nor is ſuch a ſtipulation foreign to the nature of bills, eſpecially inland ones, which, in general, were only intended to be ſecurities for lent money, or debts; and, 2*dly*, if it were foreign, it could not have the effect by law to vitiate a bill, otherwiſe good, but the condition muſt be held *pro non adjecta*. 4*to*, Suppoſing this writ could not be ſuſtained as a bill intitled to the privileges of the acts 1681 and 1696; yet it ought to be held as a probative and privileged writ, and as ſuch allowed to be a ſufficient document of debt and ground of action, in the ſame manner as miſſive letters *in re mercatoria*, and other privileged writs. And, 5*to*, It was, for many years before and after the date of this bill, the general practice, to draw bills with ſuch a condition in them; and ſuch bills were ſuſtained by many deciſions ſince the 1725, when this bill was drawn: and therefore, whatever may be the fate of new bills, this ought, *ex æquitate*, to be ſuſtained, otherwiſe the deciſion muſt have a ſevere retroſpect.

Replied, 1*ſt*, The bill's being onerous, cannot ſupport it againſt a legal objection, eſpecially in a queſtion with creditors equally onerous; for were it gratuitous, it would be ſet aſide on that ſingle ground. 2*do*, It is not the practice of other nations, to make bills with this condition in them. By the *French* King's ordinance 1673, intereſt on bills is only due from the date of the proteſt for not-payment, when accepted. And the ſame rule is eſtabliſhed by the regulations of *Holland*, and the trading cities of *Hamburg*, *Frankfort*, *Augsburg*, and *Leipſic*, in *Germany*, and *Bologna* in *Italy*; which proves, that there intereſt could not be exacted or *ſtipulated from the date*, in caſe of acceptance. The acts 1681 and 1696 only ſupport bills executed according to the cuſtom of nations; and conſequently, by declaring this writ null, the

court

court will not forfeit the creditor of a valid obligation, or assume legislative powers, but only find, that the writ founded on does not fall within the description of what is intended to be privileged by those statutes; and is therefore null at common law, as wanting the form and solemnities of attestation requisite to other obligations by the acts 1579 and 1681. *3tio*, This addition renders it not a proper bill; because the nature of a bill implies, that the creditor has no use for his money till the term of payment, so that he cannot even be obliged to take payment sooner; and consequently his exacting interest from the date is unjust, as well as informal. Neither can this clause be held *pro non adjecta*, as it is not a superfluous addition, like a stipulation of interest from the term of payment, but an unlawful condition, which must vitiate the writ, and have the same effect as an usurious stipulation in a common contract or obligation. Inland bills never were intended as lasting securities more than foreign ones, but were authorised by the act 1696, for the benefit of inland commerce, upon the same footing as foreign bills. *4to*, If this writ is not a bill, it is good for nothing; because it wants all the requisites for constituting a valid obligation at common law. Missives, *in re mercatoria*, are held probative, in respect to the practice of nations, and benefit of commerce; and other writs have been privileged from different considerations, that do not apply to such writs as the present, which can only derive validity, in so far as authorised by statute in exception from the common rules of law; and where they do not come up to the exact nature of the writs intended to be privileged as bills, they must be altogether ineffectual. And, *5to*, No evidence appears of its having been a general practice to draw bills in this country after this manner. It is true, some such bills were formerly sustained; but this bill was drawn before any of those decisions; and therefore the drawer could not have relied on them. Besides, an erroneous practice, when discovered, cannot be too soon corrected. The decisions since the 1738, have uniformly sustained the present objection; and in doing so they do not make a new law, having a retrospect, but only declare what is now found to have been originally an intrinsic nullity.

"The Lords sustained the objection to the bill, and found the same "null."

D. R.

Act. Dav. Rae. *Alt. Ja. Burnett.*

N° LVIII. 18th *November* 1757.

RANKING of the CREDITORS of ALISON of DUNJOP.

Adjudication restricted, where accumulate sum blank in the decreet.

IN the ranking of the creditors of *Dunjop*, it was *obejcted* by some of the creditors, to an adjudication against the estate of *Dunjop* produced by *Anne* and *Margaret Auchinlecks*, That though the summons of adjudication recited the debts on which adjudication was sought; yet that the accumulate sum was blank in the decreet of adjudication, and abbreviate

abbreviate of it. The creditors did not inſiſt upon reducing the adjudication *in totum*, but only to reſtrict it to a ſecurity for the principal ſums, annualrents, and expences of deducing the adjudication.

Anſwered for *Anne* and *Agnes Auchinlecks*, The objection was not good to ſtrike them off from the penalties and accumulations of the their adjudication. The act 1672, which preſcribes the method of adjudications, does not require the amount of the principal ſum, annualrents, and penalties of the adjudication, to be expreſſed in one ſum; neither is there any warrant in the ſignature of the judge for ingroſſing that amount: and though the extracters are in uſe to fill it up in extracting the decreet, yet there is no neceſſity to do it, the ſame being merely an operation of figures, in which there can be no miſtake, and which any one may do.

Replied for the creditors, Compriſings gave originally as much land as was equal to the avail of the ſum; afterwards they gave a fifth part more; and therefore the ſum ought to have been aſcertained and expreſſed when the decreet was pronounced. Beſides, as the adjudication becomes a real burden upon the lands, it ought to appear with certainty from the records, how much the lands are burdened.

"The Lords found, That the accumulate ſum's not being filled up, "is no nullity in the adjudication; and reſtricted the adjudica- "tion to a ſecurity for the principal ſum, annualrents, and ex- "pences of deducing the adjudication." J. D.

For *Auchinlecks*, *Arch. Murray*. For the creditors, *Bruce*.

N° LIX. 16th *November* 1757.

ROBERT SYM, TRUSTEE for JACKSON's CREDITORS,

AGAINST

ALEXANDER SIMSON.

Truſt-diſpoſition omnium bonorum *by a bankrupt, If it excludes the ſubſequent diligence of outſtanding creditors?*

PAtrick and *James Jackſons* having become bankrupt, and their creditors having, upon different diligences, carried off the greateſt part of their effects, the *Jackſons*, at a general meeting of almoſt all their creditors, except *Alexander Simſon*, executed a diſpoſition of the remainder of their effects, to *Robert Sym*, as truſtee for all their creditors. The diſpoſition was ſimple, unqualified; reſerved the ſeveral rights and preferences of the creditors; enumerated them all; referred to a ſigned inventory of the debtors effects; and contained none but the moſt common and ordinary clauſes neceſſary for its receiving execution.

In conſequence of this diſpoſition, the creditors ſtopped their diligences.

Two months after, *Alexander Simſon*, who had not uſed any diligence before, arreſted in the hands of *Robert Sym* for a debt due to him by

the *Jacksons*. The sheriff decerned in the forthcoming; *Robert Sym* advocated the cause.

Simson pleaded, in the advocation, That a disposition *omnium bonorum* by a bankrupt, could not stop the diligence of creditors.

Sym made *answer* upon the common argument made use of in support of such dispositions. And, 2*do*, That the case in hand was more favourable than the common case of such general dispositions; for that it was only a conveyance of the remaining part of the bankrupts estate, after the greatest part of it had been torn away by diligence; and that, even of it, the division had, before the meeting of the creditors, been already fixed by the diligences which the creditors had by that time used, in which those who had diligences had only an interest, and in which *Simson* had no interest, it not being denied, that if the other creditors had gone on in their diligences, without using the trust-disposition, there would not have been left any thing for him to have drawn.

"The Lords assoilzied *Robert Sym*." J. D.

For *Sym*, *J. Dalrymple*, *Geo. Brown*. For *Simson*, *Arch. Murray*, *Lockhart*.

N°LX. 17th *November* 1757.

ISABEL GORDON,

AGAINST

KATHARINE ROSS.

1. *Personal and real.*— 2. *Implied condition.*

Alexander Gordon of *Kilgour* executed a family-settlement, whereby, under other provisions, he assigned and disponed, to his son *John Gordon*, part of his moveables, and a wadset of 10,000 merks, affecting Lord *Sutherland*'s estate: After which followed these words in the dispositive clause: "With the burden always of my said son's payment-"making to *William Gordon*, his son, and my grandson, of the sum of "3000 merks; and with the burden of payment-making to *Isabel Gor-*"*don*, my eldest grandchild, of the sum of 1200 merks; and of payment "to them of the annualrents of the said principal sums after my "decease, and termly during the not payment thereof; with full power "to my son to intromit with, and dispose of the said moveables dis-"poned to them, as said is, after my decease; and to my said son and "his heirs, to charge and pursue for the said *L.* 10,000 *Scots* money "foresaid; possess my wadset lands, whereby the same is due; use "requisition, and all other things necessary thereanent; and anent the "premisses, to do as accords." And the deed reserves a power of revocation to the granter, and dispenses with the not delivery.

Alexander died without revoking, and *William* his grandson died before him.

In a competition betwixt *Isabel Gordon*, his grand-daughter, and *Katharine Ross*, widow of *John*, and creditor to *John* upon his contract of marriage, *Isabel Gordon insisted* to be preferred upon the wadset in Lord

Lord *Sutherland*'s eſtate; 1*mo*, in her own right, for the 1200 merks provided to her by her grandfather; 2*do*, in her brother *William*'s right, to whom ſhe was heir, for the 3000 merks provided to him by her grandfather.

To *Iſabel*'s claim for the 1200 merks, *objected* by *Katharine Roſs*, That though burdening clauſes of the nature of this one, are generally underſtood to create a real lien upon the ſubject diſponed; yet a diſtinction ought to be made betwixt the caſe where, the debt *ab ante* exiſting, the granter only burdens his own ſubject with his own debt, and the caſe where, as in the preſent queſtion, the proviſions were by the diſpoſition only created debts upon the diſponee.

" The Lords found the proviſion a real burden on the wadſet."

To *Iſabel*'s claim, in her brother's right to the 3000 merks, *objected*, for *Katharine*, That the ſum, being ſubject to the grandfather's power of revocation, payable only at the firſt term after his death, and intereſt from that term, ought to be conſidered upon the ſame footing as a bond of proviſion by a father to a child; having an implied condition, That if the child predeceaſed the father, or died before the term when the proviſion became due, it did not tranſmit to the child's heir.

Anſwered for *Iſabel*, This was no bond of proviſion to a child; *William* had his own father living to provide for him; but was a debt created by *Alexander* upon the ſubject he diſponed; and therefore, like other debts, tranſmits to heirs. There is nothing in the circumſtance, that it was ſubject to a power of revocation. The diſpoſition to *John* veſted in him the right immediately. The only effect of the power of revocation was, that the right ſo veſted might afterwards have been defeated; but that never happened; and therefore it remained always veſted in *John*, with the burden impoſed upon it of the debt to *William*, and conſequently to *William*'s heir, though *William* happened to die before the ſum was exigible.

" The Lords found, That the conveyance of 3000 merks, in favour " of *William*, was vacated by his predeceaſing the granter." J. D.

For *Iſabel, Montgomery, Lockhart.* For *Katharine, Macintoſh.*

N° LXI. 20th *November* 1757.

JOHN FORDYCE of GASK,

AGAINST

URQUHART of MELDRUM.

Evidence of forty-ſhilling land prior to the year 1681.

IN a complaint by *John Fordyce* of *Gaſk*, againſt *Urquhart* of *Meldrum*, and other freeholders of *Aberdeenſhire*, for refuſing to inrol him in the roll of freeholders for that county; the title he founded on was a retour in the year 1513, which retour, in anſwer to the firſt head of the brieve, *viz.* " De quibus terris et annuis redditibus quondam " *Thomas*

" *Thomas Burnet* obiit ſaſitus?" bears the anſwer in theſe words, " Qui " jurati dicunt, Quod quondam *Thomas Burnet*, pater *Willielmi Burnet*, " latoris præſentium, obiit ultimo veſtitus et ſaſitus de terris de *Gaſk*, " cum ſuis pertinentiis, jacen. &c. et de uno annuo redditu tredecem " ſolidorum et quatuor denariorum uſualis monetæ *Scotiæ*, annuatim " de terris de *Balinalie*, jacen." &c. And,

In anſwer to the fifth head of the brieve, *viz.* " Et quantum va- " lent dictæ terræ et annuus redditus nunc per annum; et quantum " valuerunt tempore pacis?" the retour bears, " Et quod dictæ terræ " et annuus redditus valent nunc, per annum, duodecim mercas, et va- " luerunt decem tempore pacis."

Objected for *Urquhart* of *Meldrum*, The act of the 16th of the King provides, " That no perſon ſhall be intitled to vote, in reſpect of the " old extent of his lands holden of the King or Prince, unleſs ſuch " old extent is proved by a retour of the lands, of a date prior to the " 16th *September* 1681. And, *ſecondly*, That no diviſion of the old ex- " tent made ſince the aforeſaid 16th *September* 1681, or to be made in " time coming, by retour, or any other way, is or ſhall be ſuſtained as " ſufficient evidence of the old extent." But here the retour contains not only the lands of *Gaſk*, but alſo an annualrent of one merk out of other lands; and there is no room for diviſion ſince the year 1681.

Anſwered for *Gaſk*, All that the law of the 16th of the King requires is, That it be proved, by a retour prior to the year 1681, that the lands on which the title is founded were a forty-ſhilling land of old extent. Now, it is *triti juris*, that annualrents are retoured *valere ſeipſum*; and therefore, deducing the value of the annualrent from the retour, which it is abſolutely certain muſt be exactly one merk, there is a proof incontrovertible, that the lands of *Gaſk* were, of old extent, nine merks; which is far more than the forty-ſhilling required.

" The Lords found *John Fordyce* intitled to be inrolled." J. D.

For *Fordyce*, *W. Grant*. For *Urquhart*, *Burnett*, *Ferguſon*.

N° LXII. 23d *November* 1757.

ROBERT BALFOUR of BALBIRNY, and others,

AGAINST

Mrs ISABEL DOUGLAS of KIRKNESS.

In the diviſion of a commonty, the poſſeſſion by part of a barony, found to preſerve the right of the whole barony.

THE predeceſſors of Mrs *Iſabel Douglas* of *Kirkneſs* were infeft in the barony of *Kirkneſs* and pertinents; and they and their tenants had been in uſe, paſt memory of man, to paſture upon the commonty of *Boglochty*: but for forty years paſt, the poſſeſſors of two of the farms of the barony had neglected to paſture any cattle upon it, owing to ſome alterations in the improvement of thoſe farms by the proprietors.

Robert

Robert Balfour-Ramſay of *Balbirnie*, and others, were infeft in lands adjoining to the bog of *Boglochty*, with a privilege of common paſturage in that bog; and they, and all their tenants, had been in uſe, both in old and late times, to paſture their cattle upon it.

In a diviſion of this commonty, brought by *Robert Balfour-Ramſay* and others, againſt Mrs *Iſabel Douglas*, the purſuers *inſiſted*, That Mrs *Douglas* had right to a ſhare in the diviſion of the commonty, not in proportion to her valued rent of the whole barony of *Kirkneſs*, but in proportion to thoſe parts of it which had, for above forty years, been in uſe to paſture upon the commonty.

Anſwered for Mrs *Douglas*, it appears from the proof, that, of old, the whole farms of the barony poſſeſſed this common, whereby their common property in it was eſtabliſhed equally with that of the purſuers: and though ſome of the farms, by being incloſed, had no occaſion, for many years paſt, to ſend their cattle to the common; yet the poſſeſſion that has been had is ſufficient to preſerve the right of common property once eſtabliſhed in the proprietor of the barony.

"The Lords found, That the defender has right to a ſhare in the "diviſion of the commonty, in proportion to her valued rent of "the whole barony of *Kirkneſs*." J. D.

Act. *Advocatus, Lockhart.* Alt. *And. Pringle, Ferguſon.*

N° LXIII. 1ſt *December* 1757.

WILLIAM GORDON writer to the ſignet,

AGAINST

Major ARTHUR MAITLAND.

I. 1. *Debts acquired by a husband, affecting his wife's eſtate, do not preſcribe during the marriage.*— 2. *Preſcription does not run during the minority of the perſon for whoſe behoof a right is acquired in truſt.*

SIR *Charles Maitland* of *Pittrichie*, in the year 1700, executed an entail of his eſtate, by procuratory, "in favour of himſelf in liferent, "and *Charles*, his only ſon, in fee, and the heirs-male of his body; "which failing, to the other heirs-male of his own body; which failing, to the heirs-female of his ſon *Charles*'s body, and the heirs-male "of their bodies, the eldeſt daughter or heir-female always ſucceeding "without diviſion; which failing, to *Jean Maitland*, his own eldeſt "daughter, and the heirs-male of her body; which failing, to his other four daughters *ſeriatim*, and the heirs-male of their reſpective "bodies."

This deed contained no limitation upon *Charles* the fiar, or the heirs-male; but the daughters and heirs-female were reſtricted from ſelling or alienating the eſtate, or affecting it with debt above 20,000 merks *Scots*.

Sir *Charles Maitland* was ſucceeded by his ſon Sir *Charles* the younger; who died in the beginning of the year 1704, without iſſue, whereby

the ſucceſſion opened to his eldeſt ſiſter *Jean*; who made up titles to the eſtate of *Pittrichie*, by ſervice to her brother, and infeftment; and ſoon after intermarried with Baron *Maitland*; of which marriage there was iſſue one ſon, *Charles*, and four daughters.

Sir *Charles* the younger, during his poſſeſſion, as he was under no limitation by the tailzie, had contracted large debts, the principal ſums amounting to *L.* 19,640 *Scots*, all due by moveable bonds. Theſe debts were, by degrees, purchaſed in by the Baron, and aſſignations taken to them, either in his own name, or in that of a truſtee; and, in the year 1721, a ſhort time before the Baron's death, they were all conveyed by him and his truſtee to Dr *John Gordon:* of the ſame date with which conveyance Lady *Pittrichie* granted an heritable bond to Dr *Gordon* for the ſum of 20,000 merks, with annualrents from the term of *Whitſunday* 1721, and bearing to be in exerciſe of the powers reſerved to her by the tailzie of *Pittrichie*; Dr *Gordon*, at the ſame time, granted his backbond, acknowledging himſelf to be only truſtee for the Baron, and obliging himſelf to denude of the heritable bond, as well as of the whole other debts, in favour of the Baron, or any other perſon to be named by him.

Accordingly, by a deed executed in 1721, the Baron nominated his only ſon *Charles Maitland* as the perſon in whoſe favour Dr *Gordon* was to denude, upon his attaining to the age of majority; but with and under the burden of certain proviſions therein ſpecified to his four daughters.

In 1728, *Charles Maitland* the ſon, executed new bonds of proviſion in favour of his two only ſurviving ſiſters, *Katharine* and *Anne*; whereby, in lieu of the proviſions formerly ſettled upon them, which were 8000 merks to *Katharine*, and 6000 merks to *Anne*, he became bound to pay to his ſaid two ſiſters, at their ſeveral ages of twenty-one, or marriage, to *Katharine* the ſum of 10,000 merks, and to *Anne* 9000 merks, with penalty and annualrent after the term; and it was declared, that theſe ſhould be in full ſatisfaction of the proviſions contained in their father's ſettlements 1721, and of all bairns part of gear or portion-natural to which they might be intitled through the deceaſe of their father.

In 1730, Dr *Gordon*, upon a narrative of the backbond and deed of nomination above mentioned, denuded himſelf of the heritable bond, as well as of the whole other bonds already mentioned, by a conveyance in favour of *Charles Maitland*, his heirs and aſſignees.

Upon Lady *Pittrichie*'s death, which happened in *October* 1746, the ſucceſſion devolved upon her ſon *Charles*; who made up titles, by ſpecial ſervice and infeftment, as heir-male to his mother, without repeating any of the reſtrictions and limitations which, by the entail 1700, were impoſed on the heirs-female; and ſoon after he executed a new ſettlement of the eſtate, whereby, failing iſſue of his own body, he called his ſiſters to the ſucceſſion, in preference to the heirs appointed to ſucceed by the deed 1700.

Upon *Charles*'s death, in the 1751, a competition aroſe between *Katharine*, his eldeſt ſiſter, who entered into poſſeſſion of the lands, and Major *Arthur Forbes alias Maitland*, eldeſt ſon of *Margaret Maitland*, who was ſecond daughter of old Sir *Charles*; the Major laying claim to the ſucceſſion under the deed of ſettlement 1700, and *Katharine* claiming

claiming in virtue of the deed executed by her brother. In this competition the Major finally prevailed, the Lords having found, "That "*Charles* could not gratuitouſly alter the deſtination of ſucceſſion in "prejudice of Major *Maitland*;" which decree was affirmed in the houſe of Peers; and the Major, in conſequence thereof, made up titles to the eſtate of *Pittrichie*, in terms of his grandfather's entail.

The two ſiſters of *Charles Maitland* being thus excluded from the ſucceſſion to the eſtate, and reduced to the proviſions made for them by their father and brother, aſſigned theſe proviſions in truſt to *William Gordon* writer to the ſignet; who led an adjudication of the heritable bond of 20,000 merks, for payment of the original proviſions which, by Baron *Maitland*'s deed of nomination, were aſcertained to be paid out of that fund; and having likewiſe obtained himſelf confirmed executor-creditor to *Charles Maitland* for the 19,000 merks contained in *Charles*'s bonds of proviſion to his ſiſters, he gave up in inventory the bonds above mentioned, granted by Sir *Charles Maitland* younger, the rights to which had been purchaſed by Baron *Maitland*, and afterwards conveyed to his ſon *Charles*. — Upon this title, Mr *Gordon* brought an action againſt Major *Maitland*, as repreſenting the ſaid deceaſed Sir *Charles Maitland*, concluding for payment of theſe debts, with annualrent from the time of Baron *Maitland*'s death.

Pleaded for the defender, 1*mo*, The whole of the ſaid debts are loſt by the *negative preſcription*, as no action has been brought, or document taken on them, within forty years.

Anſwered for the purſuer, In the *firſt* place, Preſcription could not run during the life of Baron *Maitland*, becauſe, from the time of his marriage with the heireſs, to his death in the 1721, he was intitled *jure mariti* to the rents of the eſtate; and conſequently was debtor in the current annualrents of the debts. Accordingly, theſe annualrents were extinguiſhed in his perſon, by his intromiſſion with the rents; which therefore was a proper interruption of the preſcription, juſt as much as if the annualrents had been paid to any extraneous creditor. It would have been to no purpoſe in him to have brought a proceſs againſt his wife; becauſe, by his univerſal intromiſſion with her eſtate, he himſelf was poſſeſſed of the rents, out of which the annualrents fell to be paid; and therefore he was *non valens agere cum effectu*. — 2*dly*, Neither could the preſcription run during the period which intervened between the Baron's death and the majority of his ſon *Charles*, which was not till the year 1727: for though the right ſtood at that time in Dr *Gordon*'s perſon, he was but a truſtee for *Charles*, and preſcription muſt be interrupted by the minority of that perſon for whoſe behoof the truſt was created, and who has the ſubſtantial right in him. — *Laſtly*, No preſcription could run during the poſſeſſion of *Charles*, after his mother's death; that is, from the 1746, when he ſucceeded, to the 1751, when he died, becauſe during that time he was both debtor and creditor in the debts; and it is impoſſible to figure any benefit that he could have reaped from bringing an action againſt himſelf.

Replied for the defender, It appears, that Baron *Maitland* did not apply his intromiſſions with the rents to the payment of theſe annualrents; for in the year 1721 he concurred with his truſtee in aſſigning the principal ſums, *and whole bygone intereſt*, to Dr *Gordon*; which plainly ſuppoſed, that theſe annualrents were ſtill unpaid. And as to the ſix

years

years of *Charles Maitland*'s minority, from the year 1721 to the year 1727, the ſame could not operate any interruption of the preſcription; becauſe Dr *Gordon* ſtood at that time fully veſted in the right to theſe debts, and had the ſole *jus exigendi*; and therefore his minority alone was to be regarded.

" The Lords found the debts acquired by Baron *Maitland* and his " truſtee not preſcribed."

II. *A creditor in debts affecting an entailed eſtate, ſucceeding as heir of entail in that eſtate, the debts are not extinguiſhed* confuſione.

The defender *pleaded*, 2*do*, That the whole of theſe debts, principal and intereſt, were *extinguiſhed confuſione* by *Charles Maitland*'s ſucceſſion to the eſtate, by which he became both debtor and creditor in the debts. —The extinction of debts *confuſione*, where the creditor ſucceeds to the debtor, or the debtor to the creditor, is an acknowledged principle of the law of *Scotland*, as well as of the *Roman* law. In the preſent caſe, the debts acquired by *Charles* were his abſolute property, deſcendible to his heirs and aſſignees whatſoever, without any limitation: and as *Charles* would have been perſonally liable for theſe, had they belonged to any third party, as heir in the eſtate of *Pittrichie*, and thereby repreſenting his mother, who was in like manner univerſally liable to the debts of her brother Sir *Charles* the younger, there was an abſolute extinction of theſe debts in the perſon of *Charles confuſione*.

Anſwered for the purſuer, By the *Roman* law, there was only one kind of heir who repreſented the defunct univerſally; and therefore all obligations were neceſſarily extinguiſhed *confuſione*, where-ever the creditor or debtor ſucceeded as heir to each other. But it is quite otherwiſe by the law of *Scotland*. A ſervice *qua* heir of tailzie in a particular ſubject is not an univerſal repreſentation, ſo as to extinguiſh debts which were due by the defunct to the heir of tailzie before his ſucceſſion. In like manner, where an heir of entail purchaſes in debts affecting a tailzied eſtate, and takes aſſignations, either in his own name, or that of a truſtee, ſuch purchaſe does not operate an extinction of the debt: on the contrary, the debts ſo purchaſed are conſidered as a ſeparate eſtate, affectable by creditors, and in the abſolute power of that heir by whom the purchaſe was made. In the preſent caſe, the debts conveyed to *Charles Maitland* belonged to him and his heirs whatſoever; whereas the eſtate of *Pittrichie* was limited to the particular heirs of entail; and as the defender has aſſerted his right to that eſtate as heir-ſubſtitute under the entail, he muſt pay the debts affecting it.

" The Lords found, That the ſaid debts were not extinguiſhed *con-* " *fuſione*, by *Charles Maitland*'s ſucceeding to the eſtate of *Pit-* " *trichie*."

III. *An heir ſucceeding to an entailed eſtate, being ſued by the executors of the former heir, may plead retention againſt them for debts, of which the defunct was bound to relieve the eſtate; but cannot plead it againſt his creditors.*

3*tio*, The defender *objected* to the grounds of the purſuer's claim, and *alledged*, That the bonds of proviſion for 19,000 merks granted by *Charles*

Charles to his ſiſters, were *gratuitous*, in ſo far as they exceeded the proviſions already ſettled upon them by their father; and conſequently were reducible by the defender, who was a creditor upon *Charles*'s executry, for relief of the debts which he had wilfully brought upon the entailed eſtate, by neglecting to repeat the prohibitions and irritant clauſes in the titles made up by him: That, beſides, theſe bonds bore no clauſe diſpenſing with the not-delivery; and unleſs it were proved, that they were *delivered* by *Charles* during his lifetime, they muſt be good for nothing.—And further, ſuppoſing them both to be onerous, and to have been properly delivered, the defender is nevertheleſs intitled, as a creditor for relief of *Charles*'s debts, to plead *compenſation and retention* againſt any aſſignee or executor-creditor of *Charles*'s, how onerous ſoever he be. The defender is intitled to plead retention of Sir *Charles*'s debts againſt every perſon claiming under *Charles Maitland*'s right, until he ſhall be relieved of the debts brought by *Charles* upon the entailed eſtate. And that ſuch compenſation and retention is good, not only againſt the creditor himſelf, and his repreſentatives, but likewiſe againſt his onerous creditors, is eſtabliſhed by ſundry deciſions obſerved in the *Dictionary*, *tit. Compenſation and retention*; where it has been found, That a debtor in a bond, having become cautioner for his creditor in a bond for the like ſum, bearing a clauſe of relief, is intitled to retention againſt the creditor's aſſignee, till he be relieved of his cautionary obligation.

Anſwered for the purſuer, That the bonds of proviſions granted by *Charles*, though exceeding thoſe of the father by 5000 merks, were highly rational, and even *onerous* to their full extent: for the young ladies had a claim to their legitim upon their father's death, which was much more conſiderable than the additional proviſion thus given in lieu of it. And with regard to the *delivery*, as the bonds appear in the hands of the ladies, they muſt be preſumed to have been properly delivered to them, unleſs the contrary is proved; the preſumption in law being, That deeds appearing in the hands of the grantee were delivered of their dates, eſpecially where they are onerous.

As to the claim of *Compenſation and relief*, the ſame cannot be pleaded againſt the purſuer, as executor-creditor to *Charles Maitland*, to the extent of the ſiſters bonds of proviſion. It may be very true, that the reſidue of *Charles*'s executry, after ſatisfying theſe proviſions, is liable to the defender in relief of the debts contracted by *Charles*; but in ſo far as the ladies are creditors by their bonds of proviſion, the defender can no more claim retention againſt them, than againſt any other onerous creditor of *Charles*'s. The caſe of a debtor becoming cautioner for his creditor, on the faith of the money he had in his hands, is no way ſimilar. The Major cannot ſubſume, that he was cautioner for *Charles Maitland*, or that he engaged upon the faith of money he owed him; on the contrary, he is liable in his debts *as heir ſerved and retoured to him*. So it has been found in another proceſs at the inſtance of *Charles*'s creditors. The Major, therefore, is liable, *ex eodem medio*, both for the debts ſued for, and for the debts of which he claims relief, *viz.* that he *repreſents* as *heir* the debtor in the ſeveral debts; and it is obvious, that he cannot defend himſelf againſt the debts due by one of his predeceſſors, until he be relieved of the debts due by another, when he is liable to pay both, as their proper repreſentative. The defender

would have been liable to pay theſe proviſions, ſuppoſing *Charles* had left no ſeparate eſtate of his own; and much more muſt he be liable in this action, which proceeds upon a confirmation of bonds due to *Charles Maitland* himſelf, which the defender is liable to pay, as repreſenting Sir *Charles Maitland*, the debtor in theſe bonds.

"The Lords repelled the objection made to the delivery of the "bonds of proviſion by Mr *Charles Maitland* to his ſiſters, being "the title of the confirmation; and found, That the bonds being "in ſatisfaction of former bonds of proviſion, and in full of "their legitim, are preſumed to have been delivered of the dates, "unleſs the contrary is proved: Found, That the ſaid bonds of "proviſion were onerous to their full extent: Repelled the defence "of retention and relief, in ſo far as regards the ſaid bonds of "proviſion; but found, That after payment of what is due to "Mrs *Katharine* and *Anne Maitlands* on their bonds of proviſion, "out of the ſums confirmed, Major *Maitland* is intitled to re-"tention and relief out of the remainder of the ſums confirmed, "for all debts of *Charles Maitland* he has paid, or ſhall pay."

IV. 1. *Heir of entail bound to keep down the current annualrents of debts affecting the eſtate during his poſſeſſion.* 2. *A ſervice as heir-male in ſpecial, upon a deed of entail, without reciting the prohibitory clauſes, does it infer an univerſal paſſive title?*

4*to*, the defender *pleaded*, That no claim could lie againſt him for the *annualrents of the debts* contracted by young Sir *Charles:* For, as the purſuer had pleaded the extinction of theſe during the incumbency of Baron *Maitland*, by his intromiſſion with the rents, while he was, at the ſame time, debtor in the annualrents; and as this would equally apply to the years of *Charles*'s poſſeſſion after his mother's death; ſo the purſuer could have as little claim to the annualrents of the intervening years between Baron *Maitland*'s death in the 1721, and the Lady *Pittrichie*'s death in the 1747; during which time the Lady *Pittrichie*, as poſſeſſor of the entailed eſtate, was bound to keep down the current annualrents: and as *Charles*, her ſon, the creditor in theſe annualrents, did univerſally repreſent his mother, both by his ſervice to her under the general character of *heir-male*, and by intromitting with her moveable effects; therefore theſe annualrents were likewiſe extinguiſhed *confuſione* in the perſon of *Charles*, and could not again be reared up as a debt againſt the tailzied eſtate. The words of the retour of *Charles*'s ſervice to his mother, ſhow, that he intended to repreſent her univerſally; for, after reciting the charter under which *Jean Maitland*, Lady *Pittrichie*, died laſt veſt and ſeiſed in the lands, with the ſubſtitutions therein contained, but without any of the prohibitions or irritancies, the jury find, "Quod Magiſter Carolus Maitland eſt *legitimus et pro-*"*pinquior heres maſculus* dict. quond. Magiſtræ Jeanæ Maitland de "Pittrichie, ſuæ matris, in integris terris, &c.; et quod eſt legitimæ "ætatis," &c.

The purſuer *contended*, That the annualrents incurred during Lady *Pittrichie*'s poſſeſſion, were ſtill a ſubſiſting debt againſt the defender. For, in the *firſt* place, as the tailzie in queſtion contained no clauſe obliging the ſeveral heirs to keep down the current annualrents, it was

doubted,

doubted, how far the ſame could be ſupplied by implication. An heir of tailzie is not in the ſame caſe with a liferenter, who has only right to the free rents of the eſtate, and is under an implied obligation to tranſmit the eſtate to his ſucceſſors in as good condition as he finds it: an heir of tailzie is to be conſidered in every reſpect as an abſolute proprietor, unleſs in ſo far as he is expreſsly limited by the deed of entail. *Secondly*, *Charles Maitland* did not repreſent his mother, otherwiſe than *qua* heir of tailzie; and therefore, ſuppoſing it true, that ſhe was under an implied obligation to keep down the annualrents during her poſſeſſion; yet that will not affect *Charles*, nor his ſiſters, who do not repreſent her. *Charles*'s ſervice was intended for no other purpoſe, but to veſt in him the tailzied eſtate as heir of tailzie; and the form of the ſervice was in every reſpect proper and habile for that purpoſe. It ſets forth the tailzie under which Mrs *Jean Maitland* died laſt veſt and ſeiſed in the lands; it ſets forth the ſubſtitution of the tailzie by which the ſucceſſion devolved upon her neareſt heir-male; and the jury find, that Mr *Charles Maitland*, the claimant, was her neareſt heir-male in the tailzied lands. If it had added, *virtute prædictæ cartæ*, there could not have been a queſtion: but this adjection was abſolutely unneceſſary; becauſe the anſwer of the jury cannot poſſibly refer to any other title of ſucceſſion in *Charles* but the tailzie, under which alone he claimed to be ſerved, which he produced before the jury to inſtruct that claim, and which they again narrate in the ſervice, as the foundation of their verdict; therefore it was, to all intents and purpoſes, a proper ſervice of *Charles Maitland*, as heir to his mother, under the tailzie; and muſt infer a repreſentation of his mother in the tailzie, but cannot infer an univerſal paſſive title againſt him, as heir-male of his mother.

" The Lords found, That the deceaſed Lady *Pittrichie*, the heir of " tailzie, was bound, during her poſſeſſion of the eſtate, to have " kept down the growing intereſt on theſe bonds incurred du- " ring her poſſeſſion: but as ſhe failed to keep down theſe grow- " ing annualrents, found, That her ſon *Charles Maitland* his ha- " ving ſerved himſelf heir-male in ſpecial to her in the ſaid eſtate " of *Pittrichie*, by virtue of the deſtination contained in the tail- " zie, does not ſubject him in payment of the annualrents that " became due on theſe bonds during his mother's poſſeſſion; in " reſpect it is not alledged, that he took any other eſtate beſides " the tailzied eſtate, by virtue of the ſaid ſervice: but found it " relevant to the defender to prove, that *Charles* intromitted with " the effects of his mother after her death, other than the tailzied " eſtate; and found ſuch intromiſſion relevant to reſtrict the claim " to the extent of ſuch intromiſſions; and allowed the defender " a proof thereof, *&c.* Found no annualrents due on theſe bonds " during the time that Mr *Charles Maitland*, as heir male and of " tailzie, poſſeſſed the eſtate of *Pittrichie*, being from *October* " 1746 to *February* 1751 years; and found annualrents due on " the ſaid bonds from the month of *February* 1751, during the " not payment."

V.

V. *A brother alimenting his ſiſters, intitled to retention out of the annualrents of their proviſions.*

5*to*, The defender *pleaded*, That no annualrent was due to the ladies upon their bond of proviſion during the time that they lived in family with their brother, and were *alimented* by him: *nam debitor non præſumitur donare.*

Anſwered, They were of great uſe to their brother in the management of his family; and as they were both of age during this period, and no bargain was made concerning their aliment, nor any evidence that their brother ever intended to demand any allowance for their aliment, theſe circumſtances, together with the nearneſs of their relation, afford a preſumption in law, that no aliment was ever intended to be demanded by their brother; 6th *June* 1676, *Rigg*; *February* 1731, creditors of *Cuningham.*

"Found, That after the Lady *Pittrichie*'s death, and during the "time the young ladies ſtaid in family with Mr *Charles Mait*-"*land*, their brother, which was from *October* 1746 years to *Fe*-"*bruary* 1751 years, their aliment in *Charles Maitland*'s family, "and any furniſhings for cloaths, *&c.* during that time, falls to "be deduced from the annualrents of their bond; and they mo-"dify the ſaid aliment and furniſhings, during that time, to two "thirds of the current annualrents of their reſpective proviſions "during the period of *Charles Maitland*'s life after his mother's "deceaſe."

VI. Bona fide *poſſeſſion.*

6*to*, The defender *pleaded* an abatement of the purſuer's claim upon account of the *intromiſſion* of Mrs *Katharine Maitland* with the rents of the eſtate of *Pittrichie* for two years and a half after her brother's death, in prejudice of the defender, the heir of the inveſtiture; and which intromiſſion ought to be imputed *pro tanto* in payment of her bond of proviſion.

Anſwered for the purſuer, Mrs *Katharine*'s title to the eſtate, founded upon the diſpoſition by her brother *Charles* in her favour, though in the event found ineffectual, muſt be admitted to have been ſuch a colourable title, as to found her in a *bona fide* poſſeſſion of the eſtate, till her title was ſet aſide; and therefore the rents were *bona fide percepti et conſumpti.* She admits, that during her poſſeſſion ſhe is chargeable with the annualrents of her own and her ſiſter's bond of proviſion, as a natural burden upon her poſſeſſion; but her intromiſſion with the rents, which ſhe uplifted and ſpent, as the yearly income of her eſtate, ought not to impute in extinction of the principal ſum due by her bond of proviſion; otherwiſe her caſe will be much worſe than if ſhe had never had any pretenſions to her brother's ſucceſſion; and this *bona fides* of hers muſt, as in all other doubtful caſes, remain till ſhe is interpelled by a definitive ſentence againſt her.

Replied for the defender, That as *Katharine*'s poſſeſſion was in virtue of no ſingular title made directly to herſelf, ſhe could take it up no otherwiſe than as heir to her brother, being only called by the ſettlement,

ment, failing *Charles*, and the iſſue of his body. This required a ſervice to him; and if, without ſuch, ſhe intermeddled, that was behaving as heir to him, and muſt ſubject her to his debts; at leaſt her intromiſſions muſt go to the extinction of any claims ſhe had againſt him to the extent thereof; and no *bona fides* can be pleaded, in theſe circumſtances, to protect her from accounting for the ſame. — At leaſt, in the next place, her *bona fides* can protect her no longer than to the commencement of the proceſs. The rule of law is, That a poſſeſſor, upon whatever title, is liable to account for the fruits, and reſtore them to the true owner from the time the controverſy is begun; for after that time all poſſeſſors are equal. Nor will it make any difference, that the point is more or leſs diſputable, provided the competitor does not prevail upon ſome new fact or writ that was not known in the beginning of the ſuit.

Triplied for the purſuer, A ſervice was only neceſſary to veſt the feudal right of the eſtate in *Katharine:* but as ſhe attained the poſſeſſion upon a title clearly in her favour, and which ſhe could have completed at pleaſure, this was ſufficient to found her in a *bona fide* poſſeſſion; otherwiſe no apparent heir who continues the poſſeſſion of his predeceſſor's eſtate, would be intitled to plead a *bona fide* poſſeſſion. — Nor can her poſſeſſion under her brother's deed, be conſtrued into a behaviour as heir. If indeed that diſpoſition had ſtood, ſhe would have been her brother's heir, and as ſuch liable for his debts; but as the diſpoſition was ſet aſide, conſequently her behaviour as heir under that deed, did alſo ceaſe, and can no longer be a paſſive title againſt her. — With regard to the duration of *bona fides*, the only general rule laid down by lawyers is, That it muſt depend upon the nature and circumſtances, both of the poſſeſſor's title, and of the title of his competitor. Lord *Stair*, *b.* 2. *tit.* 1. § 24. ſays, " In ſome caſes a citation and pro-" duction of another, evidently preferable title, is ſufficient when the " poſſeſſor hath no probable title; but where he hath a *doubtful* title, " *mala fides* is only induced by *litiſconteſtation*, or by *ſentence*." — The preſent caſe muſt be allowed to have been a very doubtful one; and therefore *bona fides* muſt be ſuſtained *uſque ad ſententiam*.

" The Lords found, That the rents of the eſtate of *Pittrichie*, from " *Charles Maitland*'s death, to the 13th *July* 1753, being the date " of the firſt interlocutor of this court, in the defender's proceſs " for the eſtate, were *bona fide percepti et conſumpti* by Mrs *Katharine* " *Maitland*; and that ſhe is not accountable therefor: but found, " That during her poſſeſſion ſhe is chargeable with the annual-" rents on the bonds purſued for." W. S.

Act. *Miller, G. Brown, Ferguſon.* Alt. *Burnet, A. Pringle, Lockhart.*

N° LXIV. 7th *December* 1757.

JOHN and ROBERT ELAMS of LEEDS,

AGAINST

JAMES FISHER.

If neceſſary to diſcuſs principal abroad, when cautioner is in the kingdom?

Adam Fiſher, when at *New York*, having commiſſioned a quantity of broad cloths from *John* and *Robert Elams* of *Leeds*; and they having informed his father, *James Fiſher* of *Inverary*, thereof; *James*, in anſwer to their letter, wrote them, "That he would ſtand good for the "price, upon twelve months credit from the time of ſhipping the "goods, in caſe his ſon failed in his circumſtances."

Upon this letter, Meſſ. *Elams* furniſhed the goods, which arrived at *New-York*.

When the price of the goods fell due, which was in a year, Meſſ. *Elams* wrote ſeveral letters to *Adam Fiſher* for payment; but had no anſwer. When they inquired for his funds in *Britain*, they found he had none there; and there appeared on record ſome arreſtments and hornings againſt him, ſubſequent to the furniſhing. Upon this they brought a ſuit againſt *Adam* on the furniſhing, and againſt *James* on the above letter; in which decreet went in abſence againſt *Adam*.

But *James*'s *defence* was, That though *Adam* had no effects in *Britain*, it was incumbent on Meſſ. *Elams* to purſue *Adam* in *America*; and until they ſhowed, that they could not recover payment from him there, they could not come upon *James*.

Anſwered, Where a creditor has a cautioner for his debt in *Britain*, there is no neceſſity for him to diſcuſs the principal debtor, except in *Britain*.

"The Lords found *James Fiſher* liable for the debt." J. D.

Act. *J. Dalrymple.* Alt. *Alex. Hay, Montgomery.*

N° LXV. 10th *December* 1757.

JOHN HAMILTON,

AGAINST

THOMAS HAMILTON.

Action ſuſtained on a bill after the elapſe of twenty-one years.

John Hamilton purſued *Thomas Hamilton* for payment of a bill of L. 15, accepted by him, and payable on demand to the purſuer.

The

The ſuit was brought twenty-one years after the term of payment of the bill. *John Hamilton* did not *alledge*, he had ever made a demand for payment before. *Thomas Hamilton* all the time had been in eaſy circumſtances. The draught and ſubſcription were not denied by *Thomas*; but he *ſaid*, That in the clearance of accounts between them, he had neglected to take it up, and *pleaded* preſcription againſt the bill. The circumſtances brought by the parties, the one to ſhow that it was a real, and the other that it was not a real debt, did not afford ſolid preſumption on either ſide.

"The Lords found, That action lay on the bill, notwithſtanding "the elapſe of time." J. D.

Act. *Hamilton-Gordon.* Alt. *Miller.*

N° LXVI. 14th *December* 1757.

KATHARINE CRAIG,

AGAINST

WILLIAM LINDSAY, and others.

A deed inter vivos, *made by a minor without conſent of his curators, void.*

John Craig, at his death, left a ſon, *William*, and a daughter, *Katharine*, both infants. To *William* he gave his land, worth about 400 merks yearly, and a general diſpoſition to his moveable ſubjects, worth 600 merks, with the burden of debts. To *Katharine* he gave a bond of proviſion of 3600 merks, which was a debt upon her brother.

William Lindſay, and three others, tutors to *William Craig*, during *William*'s minority ſaved out of the rents of the eſtate 2200 merks, and lent it out upon moveable bonds. A few months before his majority, they prevailed upon him to grant to themſelves, and to eight others their relations, a deed, whereby "he bound and obliged him, "his heirs and executors, *&c.* thankfully to content and pay, upon "the firſt term after his deceaſe, to the perſons therein named, the "ſeveral ſums therein expreſſed, with annualrent from and after the "term of payment: And for the more ſure payment of theſe reſpective ſums, he thereby conſtituted and appointed them his lawful ceſſioners and aſſignees, in and to the particular debts and ſums of "money therein mentioned." And by an after clauſe in the ſame deed, he "diſponed and aſſigned to the ſame perſons his whole *bona* "*mobilia*, body-cloaths, *&c.* with power to them, immediately after "his deceaſe, to intromit with and diſpoſe upon the premiſſes." The ſums contained in this obligation exhauſted the whole moveable ſubjects of *William*; and the bonds aſſigned in ſecurity of that obligation, were the bonds which had been taken by the tutors for the ſavings of the eſtate. This deed contained a power of revocation. *William* died ſoon after, and before majority.

Katharine,

Katharine, upon her brother's death, brought a reduction of this deed; and *pleaded*, That if it was to be conſidered as a diſpoſition, which it truly is, ſeeing it creates an obligation, and contains an aſſignation in ſecurity thereof, then it is void, as being a gratuitous deed, granted by a minor, having curators, without their conſent; or if it be conſidered as a teſtament, then it is void, as gratuitouſly granted, in prejudice of the relief competent to the heir from the teſtator's moveable ſubject, and to that relief which *Katharine* herſelf was intitled to, for the payment of her own portion of 3600 merks.

Anſwered for the defenders, If the deed in queſtion is to be conſidered as a diſpoſition *inter vivos*, minors are not diſabled to make ſuch diſpoſitions, unleſs where they make them to their prejudice. It conveys only moveable bonds granted to the minor himſelf, or his curators for his behoof, of which he had the abſolute diſpoſal, and might have bequeathed them by teſtament or legacy to any perſon he had a mind. It ſeems impoſſible to ſay the minor ſuffered any prejudice by this deed; becauſe he reſerved an expreſs power to himſelf, at any time after, *etiamſi in articulo mortis*, to alter the ſame, and diſpoſe of the premiſſes, in whole or in part, at his pleaſure. And as little can it be ſaid, that any prejudice is done to his neareſt of kin, to whom the moveables would otherwiſe have devolved, that he has conveyed them to another by ſuch revocable deed. The ſubject was by law at his diſpoſal. He could, without conſent of curators, diſappoint their ſucceſſion by teſtament. And as they have no legal right by the ſucceſſion, but upon the failure of his ſettling it otherwiſe, it cannot be ſaid, they have ſuſtained any legal prejudice, whether he has ſettled it in one form or another.

And therefore it is too whimſical a regulation to be preſumed in the law, that a minor, who can effectually diſpoſe of his whole moveables by teſtament, without conſent of curators, ſhould be laid under a diſability of doing the ſelf-ſame thing by another form of writing, by which he himſelf is no wiſe prejudiced; and when the ſucceſſion of his heirs *in mobilibus* is equally diſappointed, whether he declares his will in the one form or in the other.

But if, on the other hand, the deed in queſtion is to be conſidered as of a teſtamentary nature, which it truly ought to be, ſeeing it bequeaths a moveable ſubject, and does not take effect till death, then there is no doubt in law, that a teſtament by a minor without conſent of his curators, is good. And with regard to the obligation of relief which *William* is ſaid to have been under to his heir, it truly ſuppoſes an obligation upon the minor to heap up all the rents and profits of his eſtate during his poſſeſſion, and to preſerve the ſame as a fund for payment of his predeceſſor's debts. But it would be highly unreaſonable, that a minor, who has the full property of an eſtate, without any limitation, ſhould not be allowed to diſpoſe of the fruits of it during his poſſeſſion. This would be to put him in a worſe caſe than an heir of tailzie, who is fettered by limitations and irritancies; or than an interdicted perſon, who, by reaſon of incapacity, is deprived of the adminiſtration of his affairs: for ſuch perſons are ſtill at liberty to do with their rents what they pleaſe.

Many worſe conſequences would follow from this doctrine. A minor poſſeſſed of an eſtate which goes to male heirs, cannot burthen it with a ſhilling in favour of his daughters, if he ſhould die in minority:

rity: but, by this new doctrine, it ſhould not be in his power even to give them the ſavings he had made out of the rents by his own good management; but they muſt be applied, contrary to his will, to pay the debts of his predeceſſors, which affect the eſtate ſettled upon heirs-male.

The Lord *Kilkerran*, Ordinary, found, "That it was not in the "power of the deceaſed *William Craig*, a minor, gratuitouſly to diſ-"poſe of his moveables, in prejudice of the relief of his moveable "debts competent to his heir from his moveable ſubjects; and there-"fore reduced the bond and aſſignation, and decreet following there-"on, in ſo far as the ſame are prejudicial to the purſuer's relief of the "defunct's moveable debts."

But the Lords took up the matter upon the firſt point, and

"Found, That the deed in queſtion was a deed *inter vivos*, made "by a minor without conſent of his curators, and therefore void "and null." J. D.

Act. Jo. Dalrymple, Lockhart. *Alt. And. Pringle, Brown, Ferguſon.*

N° LXVII. 14th *December* 1757.

JOHN WATSON writer in *Edinburgh*,

AGAINST

JEAN ERSKINE.

A relict intromitting with her husband's effects in virtue of a general diſpoſition, found liable only for actual intromiſſions.

Robert Meek brewer in *Dalkeith*, by deed, bearing date 9th *April* 1739, "For love and favour to *Jean Erſkine* his ſpouſe, and for "the better enabling her to make payment of ſuch debts as ſhould be "reſting by him at his death, and defraying the expences of his laſt "ſickneſs and funerals," conveyed to her, in general, all his moveable effects, of whatever kind; and, in particular, without prejudice to the ſaid generality, he aſſigned to her a liſt of debts due to him by many different people, which are therein ſpecially enumerated. This deed contains alſo the following clauſe. "Declaring always, as it is hereby "expreſsly declared, That the ſaid *Jean Erſkine* ſhall be bound and ob-"liged to account to *Patrick* and *Thomas Meeks*, our children, for two "thirds of the ſuperplus, if any be, of the ſums and ſubjects hereby "conveyed, after payment of my juſt and lawful debts, and funeral-"charges; and in caſe the ſaid debts, funerals, and other expences, "ſhall exceed the moveables hereby aſſigned, the ſaid *Jean Erſkine is* "*to be no further liable than for what ſhe ſhall receive by virtue of this* "*right and aſſignation.*"

Robert Meek died within a few weeks after granting this deed; and the ſaid *Jean Erſkine*, his relict, in virtue of the conveyance in her favour, intromitted with his moveable ſubjects, and recovered part of

the debts assigned to her. The remainder of them she alledged were old and desperate, and not worth doing diligence upon.

In the year 1740, *John Watson* writer in *Edinburgh*, a creditor of *Robert Meek*'s, obtained decreet in absence, before the sheriff of *Edinburgh*, against the said *Jean Erskine*, as representing her husband, without any proof of the passive titles, other than holding her as confessed; and upon this decreet he first led an adjudication, and thereafter proceeded to poind the moveable effects of the defunct which were in her possession.

In 1743, *Jean Erskine* raised a reduction of that decreet; but the process was not properly insisted in till the year 1755; when it was *urged* for her, as a sufficient ground of reduction of the sheriff's decreet, That it was in absence, and without proof of the passive titles; and that she no wise represented the said *Robert Meek*, her husband, excepting that she had got a disposition and assignation of certain moveable debts from him, by which it was expressly declared, that she should be no further liable, than for what she should receive in virtue of the said assignation; upon which she was willing to account. And having exhibited an account of her intromissions with her husband's effects, she *insisted*, That she could not be further liable for her husband's debts than to the extent of her actual intromission. Having been reponed to her oath, upon the passive titles, she accordingly deponed, and acknowledged certain intromissions with the effects of her husband, in virtue of the foresaid assignation; but no other passive title.

The Lord Ordinary, by his interlocutor 21st of *February* 1756, "Having considered the disposition, with the pursuer's oath, found her "accountable only *in valorem* of the effects of her husband, which "she has acknowledged she has intromitted with."

John Watson reclaimed against this interlocutor, and *pleaded*, That the general rule of law was, That those who intromit with a debtor's effects, upon a title of possession sufficient to exclude others, are themselves bound to possess and intromit, and to do diligence for recovery of the debts and effects *debito tempore*, so that they may not perish by neglect, to the loss of lawful creditors: That this rule obtained with respect to executors, who are the trustees of the law, and upon whom the inventory is a check against imbezzlements; and there was no reason why an universal disponee, against whom there is no such security, should be more favoured: That he did not insist, that the pursuer should be universally liable for her husband's debts, as having accepted of a general disposition; though such was formerly the law of this country; 3d *December* 1678, *Wamphrie* against *Johnston*; but only that she should either be liable *in valorem* of the particular debts specially assigned to her, or should show, that she did exact diligence for recovering the same: That it would be a very easy method of disappointing creditors, if a debtor were allowed, by a deed *mortis causa*, to convey his whole subjects to his wife or children, declaring, that they shall only be liable for what they actually receive, of which there could often be no other evidence but their oaths; so that they may imbezzle as much as they please, without remedy, when it is in their power to take possession of all he leaves behind him, to the exclusion of his creditors: That the law does not allow a debtor so great a liberty of making his heirs liable for his debts or not just as they please; nor was it in the power of any

person

perſon to hurt his creditors, by adjecting ſuch a clauſe to a deed, declaring, That his heirs or diſponees ſhould only be liable for what they received of his debts or effects.

Anſwered for the purſuer, The rigour of our ancient law, as to penal paſſive titles, is now happily ſoftened; and by a long train of deciſions, it is now eſtabliſhed, That any colourable title is relevant to elide the paſſive titles; and that even a general diſpoſition of moveables, though without confirmation, is ſufficient to defend againſt vitious intromiſſion. If there is no pretence for ſubjecting the purſuer to an univerſal paſſive title, neither can ſhe be liable farther than *in valorem* of her intromiſſions, when, by the expreſs conception of that deed which was the title of her intromiſſion, ſhe is declared to be accountable only for what ſhe ſhould intromit with. There is no medium between theſe two extremes, of being univerſally liable, or liable only *in valorem* of the actual intromiſſions; unleſs ſomething ſpecial could be alledged, from the tenor of the writing under which ſhe intromitted, which obliged her to exact diligence; and, *in pœnam* of her neglect, made her anſwerable for the whole debts. The purſuer was not in this caſe to be conſidered as truſtee for the creditors, and as ſuch bound to exact diligence: ſhe was aſſignee for behoof of herſelf and children, *quoad* the ſurplus value of the ſubjects, after payment of the debts; and it would have been highly unjuſt to have ſubjected her to the neceſſity of doing exact diligence, which, as to many of the debts, could have been of no uſe, though it muſt have required a great expence. Her right did not bar the defender from having acceſs to the funds themſelves. He might have confirmed himſelf executor-creditor, and would thereby have been preferable to her. But although he firſt adjudged, and then poinded moſt rigorouſly, yet he conſidered any further diligence as to no purpoſe; and having left the purſuer to make the beſt ſhe could of theſe old debts, under the title of her aſſignation, ſhe can only be accountable for what ſhe actually recovered in terms of that deed.

" The Lords adhered." *G. C.*

Act. *Lockhart.*

N° LXVIII. 14th *December* 1757.

ANDREW CHALMER writer in *Edinburgh*, and ALEXANDER ROSS ſheriff-clerk of *Roſs*, purſuers,

AGAINST

RODERICK MACCULLOCH of *Glaſtullich*, and the magiſtrates and town-council of the borough of TAIN, defenders.

Action againſt magiſtrates, for eſcape of a priſoner.

IN 1731, *William Roſs*, ſometime merchant in *Fortroſe*, having failed in his circumſtances, made his elopement and fled to *Holland*,

Holland, carrying off with him ſuch of his effects as he could remove.

In 1735, he having returned clandeſtinely to this country, a petition was preſented by the purſuer *Alexander Roſs*, to the ſheriff of *Roſsſhire*, in name of the other purſuer *Andrew Chalmer*, as creditor to the ſaid *William Roſs* in ſeveral ſums contained in three bills, upon which horning and caption had followed before *William Roſs* had left the country, and in name of the ſaid *Alexander Roſs*, his agent and factor, ſetting forth the grounds of debt, *Roſs*'s abſconding, and return, and his intention to ſecrete the remainder of his effects; and praying for a warrant to the officers of the law, to ſearch for, ſeize, and impriſon the perſon of the ſaid *William Roſs*, and to keep him in ſure firmance until liberated by due courſe of law.

The ſheriff granted warrant in the above terms; and, by virtue thereof, *William Roſs* was apprehended, and incarcerated in the priſon of *Tain* by one of the bailies of that borough. He remained in priſon for ſome days, till by the aſſiſtance of *Roderick Macculloch* of *Glaſtullich*, his brother-in-law, and the alledged negligence of the jailor, he made his eſcape out of priſon, in the day-time.

The purſuers brought their action in this court againſt the magiſtrates of the borough of *Tain*, as liable for the debt, in reſpect of their having ſuffered the priſoner to eſcape, either by the negligence of the jailor, or the inſufficiency of the jail; and againſt *Roderick Macculloch* of *Glaſtullich*, as aiding and aſſiſting to the priſoner in his eſcape.

A full and diſtinct proof was brought of the manner in which the priſoner made his eſcape. The priſon itſelf was proved to have been abundantly ſufficient: That there were no leſs than three doors through which the priſoner muſt have made his way before he could eſcape, *viz.* the room-door, the door at the foot of the ſteeple, and the outer door of the priſon: That all theſe had cat-bands, and iron chains for hanging locks on the outſide, to which no acceſs could be had from within. But it was alſo proved, That the jailor allowed *Glaſtullich* acceſs to the priſoner the morning he made his eſcape, after he had reaſon to ſuſpect that an eſcape was intended: That the jailor was called away from the priſon about ſome buſineſs, with ſome of the townſpeople: That he left *Glaſtullich* in the room with the priſoner, and the room-door open: That he locked the door at the foot of the ſteeple; but to this lock there was acceſs from the inſide of the door, and it was ſo inſufficient, that it could be opened with a crooked bit of iron: That the cat-band on the outſide of this door was not locked: That a younger brother of *Glaſtullich*'s was in the hall or outer room of the priſon, between the door of the ſteeple and the outer door of the priſon, and was left there when the jailor went away: That the outer door of the priſon was left quite open: That the coaſt being thus clear, *Glaſtullich*'s brother, from without, took off the cat-band, and the priſoner from within, with a bit of crooked iron, picked the inſide-lock of the door at the foot of the ſteeple, and ſo walked out into the ſtreet with *Glaſtullich*'s ſword in his hand, followed by *Glaſtullich* at a little diſtance: That they walked up ſtreets to the outſkirts of the town, where *Glaſtullich*'s horſes were waiting for them; and thus got clear off. And from theſe circumſtances it was *argued*, That the priſoner's eſcape was plainly owing to the culpable neglect of the jailor, as well as to the aſſiſtance

assistance given by *Glastullich:* and that therefore both the magistrates and *Glastullich* ought to be found jointly liable for the debt.

Pleaded for the magistrates, Neither the magistrates nor the jailor were guilty of any culpable negligence. The prison was sufficient, and the jailor was likewise proved to be a careful and diligent officer. And in this case, when no body could have suspected, that a prisoner would have attempted to escape in broad day-light, in the face of the people, he was even so provident as to lock at least one of the doors of the prison, hung the outer chain upon the hasp, and carried the keys along with him; and had it not been from a combination of persons without, as well as within the prison, nothing amiss could have happened: and therefore, as there was neither connivance, nor culpable neglect, the accidental concurrence of circumstances, which could not be foreseen, and fraudulent assistance given by *Glastullich*, were not sufficient to subject the magistrates to the conclusion of this penal action. *2do*, In this case, the warrant of commitment was of an uncommon nature; and indeed altogether improper and illegal. The prisoner was not committed upon a caption, nor for payment of a debt: he was committed upon this single ground, That being indebted to *Andrew Chalmer* in certain sums, he was *in meditatione fugæ*, and intended to secrete his effects, and fly the country. The commitment, therefore, was for an alledged fraud or delict; and the warrant accordingly bore, as in criminal cases, That he should remain in prison until liberated in due course of law. And therefore, as there is no precedent for subjecting magistrates to the damages of a private party, upon account of the escape of a prisoner, in any case but where the commitment was expressly made for the satisfaction of a debt, it would be dangerous, and unreasonable, to extend the penal action against the magistrates, in this case, beyond the former practice. *3tio*, In the present case, neither the principal warrant of commitment, nor a copy thereof, was left with the magistrates or jailor, which was necessary, in order to certify to them the nature of the commitment, that they might have conducted themselves accordingly: and therefore, as the magistrates could not know the nature of the warrant, or for what purpose it was granted, they cannot be made liable to the pursuer in damages.

" The Lords found the magistrates of *Tain* and *Roderick Macculloch* " of *Glastullich* liable, conjunctly and severally, to the pursuers, in " the debts contained in the warrant granted by the sheriff, against " *William Ross:* but found the magistrates intitled to relief from " the said *Roderick Muccullochy*; and that the pursuers must assign " the debts contained in the warrant to the magistrates, upon their " making payment of these debts, to the end they may operate their " said relief: and assoilzied the magistrates from the expences of " process; but found *Glastullich* liable in said expences." G. C.

Act. *Lockhart.* Alt. *And. Pringle.*

N° LXIX. 15th *December* 1757.

THOMAS PATON,

AGAINST

JOHN MACINTOSH.

Apparent heir cannot remove tenants.

THE ſheriff of *Angus* having decerned in a removing at the inſtance of *John Macintoſh*, an apparent heir, againſt *Thomas Paton*, *Paton ſuſpended*, on this ground, That an apparent heir could not ſue in a removing; and quoted a late caſe, *Robert Boyd* of *Penkill* againſt *Macgarva*, which had been the ſubject of Lord *Cheſterhall*'s report, when upon his trials, in which the court had unanimouſly found ſo.

"The Lords ſuſpended the letters." J. D.

For charger, *Macintoſh*. For ſuſpender, *J. Dalrymple*.

N° LXX. 16th *December* 1757.

ALEXANDER FAIRLY,

AGAINST

WILLIAM BANNATYNE and COMPANY.

Servants admitted as witneſſes in behalf of their maſters ubi eſt penuria.

Bannatyne and company in *Ayr*, were in uſe to ſend yarn, in the way of trade, to the *Cumberland* factory at *Glaſgow*: The yarn was delivered to *Fairly* a carrier, and carried by him, and ſometimes by his ſervant *Arrol*, and delivered to *Lang*, clerk to the *Cumberland* factory at *Glaſgow*.

At ſettling accounts, the *Cumberland* factory denied the receipt of 400 ſpyndles with which they were charged. *Bannatyne and company* brought a ſuit againſt the partners of the *Cumberland* factory, *Fairly*, *Arrol*, and *Lang*, concluding againſt them, to give an account, each for himſelf, of this yarn, and to make payment of it; and in the courſe of the proceſs, the delivery to *Fairly* was proved.

Fairly, to exoner himſelf, endeavoured to prove, that he had delivered it to *Arrol*, and that *Arrol* had delivered it to *Lang*; and offered the evidence of *Arrol* in ſupport thereof.

Lang objected, That *Arrol* was not a habile witneſs, having an intereſt in the cauſe to exoner himſelf.

Anſwered, If carriers were not allowed the benefit of their ſervants evidence to prove the delivery of goods, under a pretence, that their ſervants

ſervants had an intereſt to ſwear falſely, in order to clear themſelves, it would be impoſſible for them to carry on their buſineſs.

"The Lords, before anſwer, allowed the evidence of *Arrol* to be "taken, *cum nota*." J. D.

For *Fairly*, *J. Dairymple*. For *Lang*, *Miller*.

N° LXXI. 16th *December* 1757.

JOHN SMITH,

AGAINST

The GUILDRY of INVERNESS.

Interpretation of the acts 1672 *and* 1690 *in favour of royal boroughs.*

John Smith, having imported goods, to a conſiderable value, from *London*, at the harbour of *Inverneſs*, this was challenged by the guildry, as an incroachment on the privilege of the royal boroughs; and it was *inſiſted*, That the goods were eſcheated, in terms of the acts of parliament 1672 and 1690, in favour of the royal boroughs. And accordingly the goods were ſeized, and confiſcated.

Pleaded for *Smith*, in a reduction of the decreet of the magiſtrates and guildry of *Inverneſs*, 1*mo*, The purſuer is a burgeſs of the borough of *Annan*; and therefore intitled to deal in foreign trade in any borough of the kingdom. 2*do*, The greateſt part of the goods he brought to *Inverneſs* were of the growth of *England*, or of the plantations, and the whole were purchaſed at *London* from the manufacturers or importers, in the fair way of trade; and conſequently are not to be conſidered as foreign goods, ſince the union of the two kingdoms, and the communication of trade conſequent thereupon. By the 4th article of the Union, it is provided, "That all the ſubjects of the united "kingdom of *Great Britain* ſhall, from and after the union, have full "freedom and intercourſe of trade and navigation to and from any "port or place within the ſaid united kingdom, and dominions and "plantations thereto belonging." And therefore, as the whole ſubjects in *Scotland* are at liberty to import the commodities of *England*, and to trade therein, as native commodities, no forfeiture can be incurred in the preſent caſe upon either of the above ſtatutes, although the royal boroughs, in virtue of the 21ſt article of the union, have ſtill the excluſive privilege of foreign trade as to all other countries.

Anſwered for the guildry: To the *firſt*, Although the purſuer has a burgeſs-ticket from the borough of *Annan*; yet, as it does not appear, that he ever paid ſcot and lot as burgeſs there, nor does he pretend to have any reſidence, or to carry on trade in that place, his ticket can give him no right to any privileges in another borough, of which he has not the freedom. To the *ſecond*: Although, by the treaty of union, there is a communication of trade between *England* and *Scotland*; yet ſtill that trade is to be carried on in a regular manner, according to the ſtanding laws of either nation. And as by the immemorial

morial laws of this country, no perſon could trade in goods that were not the product of *Scotland*, unleſs he was intitled to this privilege as a freeman reſiding in one of the royal boroughs; ſo it was no wiſe intended, by the treaty of union, to derogate from this privilege: on the contrary, the privileges of the royal boroughs are expreſsly reſerved to them. And as the trade carried on with *England* and the plantations is now very conſiderable, had it been intended by the union, to diveſt the royal boroughs of the privilege they formerly enjoyed with reſpect to this trade, it would have been juſt to relieve them of at leaſt one half of the burdens they pay to the public on account of their excluſive privilege.

The court was of opinion, that goods brought from *London* could not be reckoned foreign goods; and therefore

" Reduced the decreet of the magiſtrates and guildry; and found " the defenders liable, conjunctly and ſeverally, to the purſuer, " in the value of the goods confiſcated, and in damages and ex- " pences." G. C.

Act. *Lockhart.* Alt. *Ferguſon.*

N° LXXII. 16th *December* 1757.

GEORGE CAMPBELL of ELISTER,

AGAINST

ARCHIBALD CAMPBELL of JURA.

Clauſe of return of the tocher in a contract of marriage.

Archibald Campbell of *Jura* became bound, in his daughter's contract of marriage with *George Campbell* of *Eliſter*, to pay the ſaid *George Campbell*, at *Whitſunday* 1754, the ſum of *L.* 166 : 13 : 4 *Sterling* in name of tocher.

The contract contains this clauſe: " Providing and declaring, That " if the marriage diſſolves within year and day after the ſolemniza- " tion thereof, *or without heirs procreate, and exiſting, of the ſame*, then " the foreſaid tocher is to return to the ſaid *Archibald Campbell*," &c.

There was a ſon procreated of this marriage; but he predeceaſed his mother, who died in *October* 1754, after the marriage had ſubſiſted two years.

In the 1755, an action was brought againſt *Archibald Campbell*, for payment of the tocher ſtipulated to be paid by him.

Pleaded for the defender, By the above-recited clauſe in the contract of marriage, the tocher is provided to return, in two caſes, *1ſt*, If the marriage ſhould diſſolve within year and day; or, *2dly*, If it ſhould diſſolve without heirs procreated, and exiſting. Theſe are ſeparate and diſtinct conditions, and the words are clear and expreſs; ſo that there is no room left for interpretation, or preſumptions of the intention of parties. And as the caſe has happened, that there were no heirs exiſting at the diſſolution of the marriage, the defender is intitled to retain

tain the tocher, which, in that event, was provided to return to him in caſe it had been paid.

Anſwered for the purſuer, Although this contract is very inaccurately drawn; yet, from a fair and juſt conſtruction of this clauſe, according to what muſt have been in the view of parties, it is evident, that no more was thereby intended, but that in caſe of the diſſolution of the marriage within year and day, without heirs procreated and exiſting, the tocher ſhould return. There was no double condition here; and the word *or*, according to the received and known interpretation clearly eſtabliſhed in the Civil law, may, and, agreeably to circumſtances, ought to be conſtrued, not in the disjunctive but conjunctive ſenſe, being only explanatory of the former part of the clauſe; and imports no more, than that in caſe the marriage diſſolved within year and day, the bare procreation of a child ſhould not preclude the return of the tocher, if the child was not exiſting at the diſſolution of the marriage within year and day. The contrary conſtruction, contended for by the defender, implies manifold abſurdities. For, ſuppoſing the word *or* to eſtabliſh two independent conditions, if the marriage had diſſolved within year and day, by the huſband's death, though there had been a child of the marriage then exiſting, the wife would have been intitled to her liferent-proviſion, and the tocher muſt have returned. Again, ſuppoſing the marriage to have diſſolved within the year, by the wife's predeceaſe, though there had been a child procreated of the marriage then exiſting, the portion muſt alſo have returned; becauſe, according to the defender's argument, the procreation and exiſtence of children conſtituted a ſeparate independent condition, no wiſe connected with the diſſolution of the marriage within year and day: and in the other event, of the marriage diſſolving, though at the diſtance of fifty years, after the procreation of perhaps twenty children, if theſe children did not exiſt at the diſſolution of the marriage, the tocher was ſtill to return. Theſe, and others that might be mentioned, are ſo many glaring abſurdities attending the defender's conſtruction of this clauſe, that it is impoſſible it can be received.

Obſerved on the bench, The words of this clauſe are very ſtrong in favour of the defender. The obvious import of the words is, That *quandocunque* the marriage ſhould be doſſolved, if there were no children exiſting, the tocher ſhould return. But the court, *ex æquitate*, may reject the expreſs words, and explain their meaning from the intention of parties, which is as clear on the other hand.

The Lords "found, That, in reſpect it is acknowledged, that the "marriage ſubſiſted about two years, and that there was a child "procreated of the marriage, who lived for ſeveral months, the "purſuer was intitled to the wife's tocher, although the ſaid "child died before the diſſolution of the marriage, by the death "of the mother." G. C.

Act. *Lockhart.* Alt. *Hew Dalrymple.*

N° LXXIII. 16th *December* 1757.

WILLIAM FARQUHAR,

AGAINST

JOHN SHAW.

Bill granted on deathbed for a legacy,—not delivered, or ſigned by the drawer during the granter's life,—if theſe facts probable by witneſſes, againſt an onerous indorſee?

Edward Shaw, the defender's brother, on the 16th *March* 1753, when on deathbed, wrote and accepted a bill, payable to *David Shaw*, for *L.* 20 *Sterling*; which ſeems to have been a legacy, or donation *mortis cauſa*, though bearing for value. This bill, it is ſaid, remained in the cuſtody of *Edward Shaw*, the accepter, till his death, and was afterwards got up from among his papers, by the ſaid *David Shaw*, not being then ſigned by him as drawer.

David Shaw ſoon after adhibited his ſubſcription as drawer to the bill, and indorſed it to *William Farquhar* for value received.

William Farquhar, in 1756, brought a proceſs againſt the defender *John Shaw*, as repreſenting his brother *Edward*, the accepter of the bill, for payment of the contents.

The *defence* offered was, That the bill founded on was void and null, in two reſpects; 1*ſt*, As not having been granted for value, but by way of donation or legacy upon deathbed; 2*dly*, As not being ſigned by the drawer at the time of the accepter's death, having remained in the accepter's cuſtody while he lived, and been thereafter got out of his repoſitories by the drawer, and then ſigned by him. Theſe facts the defender offered to prove by witneſſes.

The purſuer *objected*, 1*ſt*, To the relevancy of both theſe objections; and, 2*dly*, To the method of proof propoſed: and *inſiſted*, That the only competent proof in this caſe was *ſcripto vel juramento* of the indorſee. And in ſupport of this laſt, *pleaded*, 1*mo*, That even although the queſtion had been with *David Shaw*, the drawer and indorſer, the only competent mean of proof would have been by his writ or oath: for as the bill appears ſubſcribed by him as drawer, his ſubſcription muſt be held, *præſumtione juris et de jure*, to have been adhibited at the date; and to admit witneſſes to prove the contrary, would be to take away writing by witneſſes, contrary to one of the fixed principles of our law. The objections ſtated againſt this bill are not, properly ſpeaking, intrinſic nullities, ſuch as appear *ex facie* of the writing, and make it no bill: they are purely extrinſic, and ſuch as import a ground of defence, rather than a total voidance of the debt. And when an extrinſic nullity is objected, and offered to be proved, this is offering a proof quite contrary to the averment of the bill, which the law does not allow by witneſſes, but only *ſcripto vel juramento*.

2*do*, As the purſuer is an onerous indorſee, no nullity whatever, other than ſuch as appears *ex facie* of the bill, can hurt him, who *bona fide*

fide gave value for it on the faith of its being a good bill. The law has eſtabliſhed it as a fixed privilege in the caſe of bills, That exceptions competent againſt an indorſer, cannot prejudice an onerous indorſee. Were it otherwiſe, the currency of bills would be at once deſtroyed. And this is not confined to an exception ariſing after the bill is duly conſtituted, ſuch as payment made to the indorſer, or compenſation on his debt; but extended to ſuch exceptions or nullities as affect the original conſtitution of the bill itſelf. Thus an exception founded on the ſtatute for reſtraining exceſſive and deceitful gaming, is unqueſtionably a nullity which affects the original conſtitution of a bill; and yet ſuch exception was found not to affect an onerous indorſee, 26th *January* 1740, *Neilſon contra Bruce*.

Anſwered for the defender, *1ſt*, The relevancy of both the objections to this bill is founded on the principles of law, and the deciſions of the court. With regard to the mean of proof, *1mo*, Suppoſing *David Shaw*, the indorſer, had been the purſuer, it is clear, that the nullities here proponed would have been probable againſt him by the witneſſes preſent at the granting of the bill, and who ſaw it, unſigned by the drawer, among the granter's papers after his death. Such facts, in their nature, cannot be proved by writings, but only by witneſſes. This general point, That a deed was in the poſſeſſion of the granter at the time of his death, and the condition of the deed at that time, and the way and manner in which it paſſed into the hands of the pretended creditor, are all probable by witneſſes, as conſiſting in facts which fall under the obſervation of witneſſes. And the court has applied this general rule even in the caſe of bills. Thus, in a competition betwixt an onerous indorſee to a bill, and an arreſter, it having been alledged by the arreſter, That the bill was not completed by ſubſcription of the drawer at the time of the arreſtment, the alledgeance was found relevant to be proven *prout de jure*; *Dict. Deciſions*, *vol.* 2. *p.* 218. 14th *February* 1734, *Neilſon*.

2*do*, There is no ſolid ground in law for making a diſtinction betwixt the caſe of the indorſer and indorſee. The exceptions made againſt this bill are intrinſic nullities in the conſtitution of the bill itſelf; and conſequently muſt deſtroy the foundation upon which the indorſee pleads the privilege which the law has given to bills. If the facts ſet forth are true, the bill was void *ab initio*, *quoad* the accepter, as if it had not been granted; and therefore the ſame mean of proof which would be competent againſt the perſon to whom the bill was firſt granted, muſt alſo be competent againſt the indorſee. If it were otherwiſe, the law, in every caſe of this nature, could eaſily be eluded. The perſon who receives a bill by way of legacy from a perſon upon deathbed, would have no more ado, but to indorſe it away to a third perſon for value; which would effectually exclude the challenge againſt the bill; and the repreſentatives of the defunct would be left without remedy. The caſe of *Neilſon contra Bruce*, quoted by the purſuer, does not apply: for the exception there founded on from the ſtatute, was not an intrinſic nullity in the bill, which did not bear, that it had been granted for money loſt at play.

"The Lords allowed a proof before anſwer." G. C.

Act. *Wallace*. Alt. *Miller*.

N° LXXIV.

N° LXXIV. 21ſt *December* 1757.

ELISABETH BRODIE, relict of WILLIAM STUART merchant in *Edinburgh*,

AGAINST

ARCHIBALD STUART merchant in *Edinburgh*.

1. *Poſſeſſion of the moveables by the neareſt of kin, veſts the right without confirmation.* —— 2. *Obligation by one of the neareſt of kin decerned executor, to account to his brother, who was abroad, for his ſhare, if effectual, notwithſtanding the brother's predeceaſe?*

Margaret Charteris, relict of the deceaſed *Daniel Stuart* writer in *Edinburgh*, kept a ſhop in *Edinburgh*, and dealt to a conſiderable extent. She died inteſtate upon the 13th of *April* 1748, leaving iſſue four children, *viz. William Stuart*, the purſuer's huſband, who was then abroad in the *Eaſt Indies*; *Archibald*, the defender; and *Alexander* and *Margaret Stuarts*. A few days after her death, particular inventories of the whole effects and debts belonging to her, amounting to upwards of *L.* 1500 *Sterling*, were made up by *Archibald Stuart* the defender, her ſecond ſon; who took upon him the management and diſpoſal of theſe funds, for the behoof of all concerned.

In *September* 1748, *Archibald* moved an edict for being decerned executor *qua* neareſt in kin to his mother; and was accordingly decerned; but before any confirmation could be got expede, and the active title thereby eſtabliſhed in his perſon, the purſuer *Eliſabeth Brodie*, as factrix to her huſband *William Stuart*, the eldeſt ſon, who was then ſuppoſed to be alive, did, upon the 5th of *January* 1749, prefer a petition, in name of the ſaid *William Stuart*, to the commiſſaries of *Edinburgh*, *inſiſting*, That the ſaid *William Stuart* might be conjoined with *Archibald*, the ſecond ſon, in the confirmation; which was accordingly ordered by interlocutor 25th *January* 1749. On the 8th of *March* thereafter, *Archibald*, with a view to ſave expences, expede a confirmation for the ſum of *L.* 22 *Sterling* only, being a ſmall debt due to the defunct.

After *William Stuart* was thus conjoined in the office, *Archibald* entered into a tranſaction with *Eliſabeth Brodie*; the reſult of which was, that *Archibald*, upon the 23d of *February* 1749, granted a declaration or obligation to the purſuer, as factrix for her huſband; which contains a recital of the facts before ſet forth; and then proceeds in theſe terms: " And I being now ſatisfied of my brother's right, which I ne-
" ver intended to diſappoint, but only, by not confirming the whole
" ſubjects which belonged to the ſaid *Margaret Charteris*, to ſave char-
" ges as much as poſſible, for the intereſt of all concerned; and I ha-
" ving this day ſigned exact duplicates of the inventories above men-
" tioned, which I have herewith delivered to the ſaid *Eliſabeth Brodie*
" his ſpouſe: I acknowledge and declare, That I have taken the ſaid
" effects, and grounds of debt, into my cuſtody; and that I am to
" ſeek in and recover the ſaid debts for the joint behoof of the ſaid
" *William*,

" *William*, and of *Alexander* and *Margaret Stuarts*, my brothers and " ſiſter; for all of whom I hereby declare, that I hold the ſaid office " of executry in truſt, as well as for myſelf; and I oblige me to ac- " count for, and to pay to them, and their heirs, *&c.* their full ſhare " of the ſaid executry, in ſo far as ſhall be due to each of them, after " deducing the debts, and charges of management, in the ſame way " and manner as if all of them had been conjoined in the ſaid office, " and had confirmed every particular contained in ſaid inventories."

Soon after this obligation was granted, accounts were received of *William Stuart*'s death upon the 9th *December* 1748, in the *Eaſt Indies*; and as it thereby appeared, that *William* was dead ſome time before the aforeſaid application, for his behoof, made to the commiſſaries by the purſuer for his being conjoined in the office; and conſequently before the above declaration or obligation was granted, upon ſuppoſition of his being then alive; the queſtion occurred, What right or benefit accrued to the purſuer, who had been left *William*'s ſole executrix, from the ſaid obligation?

The purſuer having confirmed herſelf executrix to *William*, brought an action againſt *Archibald* to recover her huſband's fourth ſhare of the effects of *Margaret Charteris*. *Archibald* raiſed a multiple-poinding, calling all parties concerned; and the cauſe being heard before the Lord Juſtice-Clerk Ordinary, his Lordſhip, on the 27th *February* 1755, pronounced the following interlocutor, " Finds the defender *Archibald* " *Stuart* muſt account to the purſuer *Eliſabeth Brodie*, in the right of " *William Stuart* her huſband, for the fourth part of the ſhop-goods, " lying money, houſehold-furniture, and other moveables, which were " in the poſſeſſion of the defender's mother at the time of her death, " and were intromitted with by the defender; and makes aviſandum to " the Lords with the other points in debate."

By this interlocutor, a diſtinction was made betwixt the *bona mobilia* which had been in the poſſeſſion of *Margaret Charteris* at the time of her death, and afterwards intromitted with by the defender; and the *nomina debitorum*, or the debts conſtituted by writ, and ſtanding in the account-books of the defunct; which laſt amounted to upwards of *L.* 1100 *Sterling*. The interlocutor was founded upon the authority of the later deciſions of the court, particularly in the caſe of *Macwhirter* againſt *Miller*, in 1744. It was here held, as in former late caſes, that the right to moveables was eſtabliſhed in the neareſt of kin for the time, by poſſeſſion, without actual confirmation; and that the defender's obligation, though of date poſterior to *William*'s death, ought ſo far to operate in favour of him, and of his executors, as to intitle the purſuer to *William*'s ſhare of the *bona mobilia*, notwithſtanding that *William* was dead at the time of ſaid obligation, in reſpect he was alive at the time when *Archibald* intromitted with theſe. The Lord Ordinary's interlocutor, upon this point, was acquieſced in by the parties, and became final.

The other point in this cauſe, reported to the court, was, Whether the purſuer had alſo right to a ſhare of the debts due to the defunct?

Pleaded for the defender, 1*mo*, It is held by all our lawyers, that confirmation is neceſſary to veſt a right in the neareſt of kin to the debts due to a defunct, as being the proper *aditio hereditatis in mobilibus*, and the only method known in the law of tranſmitting ſuch ſubjects from the dead to the living. The being decerned executor is but an

incomplete ſtep towards the making up of the title; it is the actual confirmation only which completes it, and ſerves to tranſmit the right. This method the law has deviſed, not only for the benefit of all concerned in the executry itſelf, to prevent concealments; but more particularly as to the *nomina debitorum*, in order to ſecure the debtors, who have an intereſt to ſee that proper titles be eſtabliſhed, whereby they may pay ſafely. And as no debtor can be compelled to pay, but upon actual confirmation, this ſhows clearly, that our law, as to this point, remains firmly eſtabliſhed. 2*do*, With regard to the obligation granted to the defender, it can have no effect, as it proceeds upon an error *in ſubſtantialibus*, *viz.* upon an erroneous ſuppoſition, that *William* was then alive, and thereby capable of eſtabliſhing a title to his ſhare of the moveable effects by confirmation; or, which would be tantamount, of acquiring right by the defender's obligation; but as *William* was dead before that time, and even before the purſuer, as his factrix, made the aforeſaid application to the commiſſaries for his being conjoined in the office, the obligation was rendered abortive: and as *William* was then incapable of acquiring any right, matters remained upon the ſame footing as if no ſuch obligation had been granted.

Anſwered for the purſuer. To the *firſt:* Whatever may have taken place in our ancient law, it is now an eſtabliſhed point, founded on reaſonable conſiderations and juſt principles, That confirmation is not neceſſary; but that the *jus ſanguinis* veſts the full right of moveables in the neareſt of kin, and tranſmits the ſame to their repreſentatives; 17th *December* 1729, *Shearer contra Wilſon*; 14th *November* 1744, *Macwhirter contra Miller*. And therefore, as *William Stuart*, the purſuer's huſband, was alive when the above ſteps were taken by the defender, the whole moveables which had belonged to their deceaſed mother, having ceaſed to be *in bonis* of her, became the property of her children. And notwithſtanding *William* died before the execution of the foreſaid obligation, and although there was a defect in the incompleted title of the neareſt of kin; yet the defender having moved an edict, and being decerned executor on the ſaid 28th *September*, upon which confirmation was expede 8th *March* thereafter, the ſame was ſufficient to ſupply any defect of title, and did accreſce to *William*, and the other neareſt of kin. To the *ſecond:* The inductive cauſe ſet forth in the defender's obligation, is, "That he was ſatisfied with his brother's "right, which he never intended to diſappoint;" and therefore "he "obliges himſelf to account for and pay to his brothers and ſiſter, *their* "*heirs*, *executors*, *or aſſignees*, their full ſhare of the ſaid executry, in "the ſame way and manner as if they had been all conjoined with "him in the ſaid office," *&c.* As therefore the defender held this office of executry in truſt, for the behoof of all concerned, and who had acquired a right thereto upon the death of their mother, his after confirmation muſt, in terms of his obligation, accreſce to the purſuer in right of *William*, who was alive at the time that the defender was decerned executor by the commiſſaries: nor can he now be allowed to counteract his own expreſs obligation, which was founded on motives of juſtice, and the principles of law.

"The Lords found, That by the obligation, dated 23d *February* "1749, the defender *Archibald Stuart* was accountable to the "purſuer *Eliſabeth Brodie*, as in the right of the deceaſed *Wil-*

"*liam*

" *liam Stuart*, the defender's eldeſt brother, and likewiſe to *Alex-*
" *ander* and *Margaret Stuarts*, the defender's brother and ſiſter,
" for their proportion of the debts due to *Margaret Charteris* their
" mother." G. C.

Act. *Da. Dalrymple.* Alt. *Lockhart.* Reporter, Juſtice-Clerk. Clerk, *Home.*

N° LXXV. 21ſt *December* 1757.

Mr DAVID TURNER, MINISTER of GREENOCK, purſuer,

AGAINST

The MAGISTRATES and COUNCIL of the borough of GREENOCK, and the FEUERS and INHABITANTS thereof, defenders.

Uſe of payment for forty years paſt, of an additional ſtipend, by the inhabitants of a borough of barony to their miniſter, found ſufficient to bind them in all time coming.

IN the year 1686, the village of *Greenock* was erected, by a charter from the crown, into a borough of barony, in favour of Sir *John Schaw* of *Greenock*, with the uſual privileges competent to every borough of barony.

In the year 1741 and 1751, Sir *John Schaw* granted charters to the feuers and ſub-feuers of the borough, impowering them to elect two bailies, a treaſurer, *&c.* for adminiſtration of juſtice, maintaining order, and managing the funds for the common good of the borough, with all powers competent to the magiſtrates of any other borough of barony; " reſerving to the baron-bailies to be appointed by Sir *John*, " and his heirs, a cumulative juriſdiction over the inhabitants of the " town, with the bailies to be choſen in virtue of the above grant." In purſuance of this charter, a magiſtracy was regularly elected, and the borough has continued under their government.

The pariſh of *Greenock* conſiſts of the borough and barony of *Greenock*, and of the village of *Crawfurdſdike*. In the year 1694, the pariſh of *Greenock* having become vacant, the heritors and elders thereof joined in giving a call to Mr *John Stirling*; and as the ſtipend of the pariſh was then only *L.* 50 *Sterling*, which was all payable out of the teinds of the landward pariſh; and as the number and wealth of the inhabitants was then greatly increaſed, by means of their growing trade; the feuers of the town of *Greenock* and *Crawfurdſdike*, in order to encourage Mr *Stirling* to accept of the call, made offer to pay him an additional ſtipend of *L.* 400 *Scots* yearly, of which *L.* 300 was to be paid by the feuers of *Greenock*, and *L.* 100 by the feuers of *Crawfurdſdyke*. This agreement was entered into at the ſight of the preſbytery; and, by their appointment, bonds to the above effect were granted, and lodged with the clerk of the preſbytery. And it appears to have been one of the conditions inſiſted on by the preſbytery, That theſe bonds ſhould be granted as a ſecurity for the ſaid additional ſti-

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pend of *L.* 400 *Scots* yearly to the former modified ſtipend; and that they ſhould be regiſtered in the books of the commiſſion for the plantation of kirks, *&c.* "in order that Mr *Stirling* might have a real "right and legal title unto the ſaid additional ſtipend, as it is now "ſettled." It appears alſo from the minutes of the preſbytery, that the feuers of the town of *Greenock* agreed to grant their bonds in the terms required by the preſbytery; "and declared, that they were ſend-"ing them in to *Edinburgh*, in order to be recorded in the books of the "commiſſion." But whether they were ſo recorded or not, is not known, as the records of that court, preceding the year 1700, periſhed by fire.

The bonds granted by the feuers of *Greenock* were loſt, and could not be recovered; but the bond by the feuers of *Crawfurdſdike* was found. It proceeds upon a narrative of the ſeveral acts of the preſbytery above mentioned, and that, "at the time of Mr *Stirling*'s tranſ-"portation, the feuers of *Greenock* and *Crawfurdſdike* had agreed to pay "him an additional ſtipend of *L.* 400 *Scots* yearly, *during his incumbency*, "according to the proportions therein mentioned; and therefore they "oblige themſelves, conjunctly and ſeverally, their heirs, *&c.* to pay "to the ſaid Mr *John Stirling*, the ſaid ſum of *L.* 400 *Scots* yearly of "additional ſtipend, and that *during the haill years of his incumbency*, "*and ſerving the cure at the ſaid kirk allenarly.*"

In conſequence of theſe obligations, this additional ſtipend was regularly paid by the feuers and inhabitants of *Greenock* and *Crawfurdſdike*, from the date of the above ſettlement in the year 1694, down to the year 1746, to two ſucceſſive miniſters, and to this purſuer, without challenge or interruption; and the conſtant uniform method of raiſing this ſum was by an annual ſtent, which was proportioned upon the feuers and inhabitants by ſtent-maſters, and uplifted by collectors named by Sir *John Schaw*'s baron-bailie.

In 1741, the trade and numbers in this pariſh having continued to increaſe, a new erection of a ſecond miniſter in the town of *Greenock* took place: but the former modified, and additional ſtipends, payable to the firſt miniſter, were expreſsly reſerved to him in the new erection; and, agreeable thereto, the additional ſtipend continued to be paid him for ſeveral years after the new erection, down to the year 1746. After that period, the magiſtrates and feuers of *Greenock* refuſed to pay the additional ſtipend to the firſt miniſter, on pretence, that the greateſt part of the inhabitants live within the bounds of the new pariſh, to the miniſter of which they are burdened with the payment of a competent ſtipend; but the feuers of *Crawfurdſdike* continued to pay as formerly.

The purſuer thereupon brought an action before the court, libelling on the two bonds, and uſe of payment above mentioned; and concluding, "That the magiſtrates of the town of *Greenock* ſhould be found "liable for the ſum of *L.* 154 *Sterling* of arrears, and in payment of "the additional ſtipend in all time coming; or, at leaſt, that they "ſhould be decerned to proportion the ſaid additional ſtipend, and to "name and appoint ſtent-maſters and collectors as formerly." And in this ſummons, the feuers of the town of *Greenock* were called for their intereſt.

Pleaded for the defenders, Although the conſtant uſe of payment to

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a miniſter for forty years of any annual ſum, as a part of his ſtipend or benefice, will indeed eſtabliſh an abſolute right to that annual payment to the miniſter, and his ſucceſſors, without neceſſity of producing any original conſtitution or title in writing; yet this only takes place where ſuch payment has been made beyond the years of preſcription, either by an individual perſon, and his predeceſſors whom he repreſents, or by a body-corporate, having perpetual ſucceſſion, and power to bind their ſucceſſors, and the members of the incorporation. But the borough of *Greenock* was not a legal incorporation till they obtained their charter from Sir *John Schaw* in 1751; and the payment of the additional ſtipend to the purſuer, and his predeceſſors, from the 1694 to the 1746, may be binding upon ſuch of the particular feuers and inhabitants as have ſubmitted to that payment paſt the years of preſcription, but cannot be binding upon ſuch feuers and inhabitants as have acquired their feus, or become inhabitants of the borough, within theſe forty years, who are not bound by the preſcription: and far leſs can thoſe who have lately come within the borough, and made no payment of this additional ſtipend, be bound thereto; becauſe as this uſe of payment was not made by any body-corporate, or by their legal repreſentatives, the community could not be bound by the deeds of the individuals.

2*do*, From the writings produced, there is ſufficient evidence, that the bonds which gave riſe to this uſe of payment, were only meant to be temporary during the incumbency of the ſaid Mr *John Stirling*, in whoſe favour they were granted. This appears particularly from the above-mentioned tenor of the bond granted by the feuers of *Crawfurdſdike*, which is produced; and the legal preſumption is, that the bonds by the feuers of *Greenock* were in the ſame terms. In the ſeveral acts and minutes of preſbytery before recited, theſe bonds are all deſcribed as in favour of Mr *Stirling* only, without any mention of his ſucceſſors in office; and in the records of the baron-court of *Crawfurdſdike*, which have been more carefully preſerved than thoſe of *Greenock*, this additional ſtipend is conſtantly mentioned as a gratuity revocable at pleaſure.

Anſwered for the purſuer. To the *firſt* defence: 1*mo*, The character and right of a borough of barony, as an incorporation, which, by the law of *Scotland*, it certainly is, ariſes from the charter of the ſovereign, and not from any after grant of the baron, impowering the inhabitants to chuſe their own magiſtrates. Such grant by the baron can eſtabliſh no new right, and is no more than a model for the government of the borough. The magiſtrates elected are the baron's bailies within the borough, and exerciſe the juriſdiction communicated to them by him, in the ſame manner as the baron's own bailie does over the reſt of the barony; and therefore the agreement made in the year 1694 by Sir *John Schaw*, the baron, with the conſent of the whole feuers and inhabitants of the borough, muſt by law be as effectual and binding, as if it had been granted by the magiſtrates and council, who are now eſtabliſhed as the heads of a legal corporation. 2*do*, When a miniſter has acquired right to any annual payment or preſtation from his pariſhioners by forty years poſſeſſion, it is good in law to eſtabliſh a right to him and his ſucceſſors in all time coming. And it is ſufficient if the miniſter has had the poſſeſſion againſt the collective body, though

not united under a legal corporation, or repreſenting one another under any paſſive title. Thus the court found, That a miniſter of a pariſh was intitled to a certain duty from the weavers of his pariſh for each loom employed by them in conſequence of a forty years poſſeſſion, although there was no incorporation of the weavers in this pariſh, which could bind themſelves and their ſucceſſors in trade; neither could it be ſaid, that the weavers which then were, did in any reſpect repreſent thoſe of the ſame employment, againſt whom the right was firſt eſtabliſhed by preſcription; 29th *November* 1698, *Birnie contra* Earl of *Nithſdale*. And the like deciſion was given 10th *February* 1666, in the caſe of the miniſter of *North Leith*. 3*tio*, As the uſe of payment, and the method of collecting it, has been eſtabliſhed for above fifty years, the purſuer is no way intereſted in the queſtion, Whether the late feuers and inhabitants ought to bear a part of this burden, with the more ancient ones who have become liable by their own and their predeceſſors uſe of payment? This they may ſettle among themſelves. The purſuer is intitled to have his whole additional ſtipend aſſeſſed and collected, in the ſame manner as has hitherto been practiſed.

To the *ſecond* defence: It appears from the minutes of the preſbytery, that it was inſiſted on, that this additional ſtipend ſhould be made not only to Mr *Stirling* perſonally, but as an addition to the former modified ſtipend of the miniſter of this pariſh; and for that purpoſe it was agreed, that the bonds to be granted ſhould be recorded in the books for plantation of kirks; which certainly was done, though theſe records are now loſt; and the conſtant continuance of payment for ſo long a courſe of time, in conſequence of that agreement, not only to Mr *Stirling*, but to two other ſubſequent miniſters, is irreſiſtible evidence of the deſign and import of theſe obligations. And this is further confirmed from the decreet of disjunction and new erection of the ſecond miniſter, which contains an expreſs proviſo, "That the bene-
" fice of the preſent kirk of *Greenock* ſhould not be thereby diminiſhed
" in any ſort." And accordingly the defenders continued the ſame regular payment of the ſtipend due to the purſuer as formerly for five years after the new erection.

" The Lords found the feuers and inhabitants of the town of *Green-*
" *ock* liable to the purſuer in payment of the additional ſtipend of
" *L.* 25 *Sterling* yearly libelled on: and found, That the method
" of levying the ſame is, by ſtentmaſters and a collector to be
" named by the bailies of the borough; and ordained the ſaid
" bailies to appoint ſuch ſtentmaſters and collector for levying,
" collecting, and paying the ſaid additional ſtipend for bygones,
" and in time coming, according to former uſage." G. C.

Act. *Miller*. Alt. *G. Brown*.

N° LXXVI.

N° LXXVI. 23d *December* 1757.

EDWARD SUMMERS,

AGAINST

SIMSON and GARDNER.

1. *The objection, That diligence was* intra annum deliberandi, *not perſonal to the heir, but competent alſo to creditors.*—2. *Method of computing the* annus.

ON the 23d *March* 1751, *Thomas Summers* died conſiderably in debt, leaving a daughter *Margaret*, and his wife with child; who, on the 23d *October* thereafter, was delivered of a poſthumous ſon, named *Thomas*.

On the 28th *January* 1752, *Simſon*, one of the creditors of *Thomas Summers* the father, took decreet of conſtitution againſt *Thomas* the ſon, as charged to enter heir to his father, and on the 16th *June* 1752, decreet of adjudication. *Thomas*, the ſon, died in *Auguſt* 1752.

In a competition betwixt the creditors of *Thomas Summers*, it was *objected* by *Edward Summers*, one of them, to this diligence, That it had been taken *intra annum deliberandi*.

Anſwered for *Simſon*, The objection was never made by *Thomas Summers*, the ſon, to the diligence. The objection was perſonal to the heir himſelf; and if he did not make it, no competing creditor could found upon it.

Replied for *Edward Summers*, By the nullity of the two decreets, there was a *jus quæſitum* to him, which the failure of the heir to object, could not diſappoint. The objection, That decreet was taken *intra annum deliberandi*, is known to make the defender as much free from the effects of the decreet, as the objection, That a bond wanted writer and witneſſes names, is known to make him free from the effect of the bond. In the laſt caſe, a creditor can object to the bond, though the defender did not; and in the other caſe, he ought to be allowed to object to the decreet, though the defender neglected to do it.

The objection of minority and leſion, or on the head of interdiction, appear to be abundantly perſonal; yet the creditors of a minor, or of an interdicted perſon, may make uſe of theſe objections for themſelves, bring a reduction on them, and turn the fruits of them to their own account.——The objection of deathbed is, from our old law-books, and the nature of the thing, as perſonal as can well be conceived; and yet it is competent to the creditors of the heir to reduce *ex capite lecti*; 16th *February* 1669, creditors of *Balmerino contra* Lady *Coupar*. ——And from the analogy of law in many other caſes, the bent of it appears to be, to give creditors the power, not only of affecting every right in their debtor, but likewiſe of pleading, each for himſelf, every relevant ground of challenge which the debtor could have pleaded.

With regard to the preſent ſpecies of objection, if the validity of it was made to depend on the heir's proponing or not proponing it, this would

would be giving a power to the heir, and not to the law, to unhinge intereſts, and create preferences. Or even, though the heir was not partial, yet chance preferences might happen, altogether contrary to equity. Every one knows, that he ought not to attack the heir for a year; and that adjudications within year and day of each other are equal; truſting to this, a creditor might not uſe his adjudication till the end of the ſecond year, and during the firſt, another creditor has proceeded: if it was deemed that the objection was only perſonal to the heir, then it might happen, that by the heir's neglecting to uſe it, a creditor might be cut out altogether, who had conformed himſelf exactly to the known procedure of law.

" The Lords found *Simſon*'s adjudication null, as *intra annum delibe-*
" *randi.*"

In this competition, it appeared, that *Gardner*, another creditor, had, on the 9th of *May* 1753, taken decreet of conſtitution againſt *Margaret Summers*, as charged to enter heir to her father; and on the 7th of *Auguſt* thereafter adjudged.

Objected by *Edward Summers* to this diligence, It was taken *intra annum deliberandi* of the year which *Margaret* had, after the death of her brother *Thomas* the ſon.

Anſwered for *Gardner*, That adding together the time betwixt the death of *Thomas* the father, and the birth of *Thomas* the ſon, when *Margaret* was heir; and the time betwixt the death of *Thomas* the ſon, and the date of the diligence, when ſhe likewiſe was heir; ſhe had more than a year to deliberate.

Immediately after the death of any perſon, the *annus deliberandi* muſt run every moment againſt ſome perſon or other; and as it is an eſtabliſhed point, That it does not run againſt a child *in utero*, it muſt have been running againſt *Margaret* the daughter.

" The Lords found *Gardner*'s adjudication void, as *intra an-*
" *num.*" J. D.

For *Edward Summers*, *J. Dalrymple*. For *Simſon* and *Gardner*, *Maequeen*.

N° LXXVII. 23d *December* 1757.

JOSEPH ALLAN portioner of LITTLEGOVAN,

AGAINST

JAMES YOUNG of NETHERFIELD, and JOHN MILLER portioner of HAZZLEDEAN.

The penalty of a mutual contract upon which adjudication has not followed, cannot be exacted, for indemnification of expences incurred in diſcuſſing a ſuſpenſion of the contract, where the other party was not ſpecially found liable in ſuch expences.

IN *January* 1750, *Young* and *Miller* entered into a contract with *Allan*, whereby *Allan* became bound to diſpone to them certain heritable ſubjects

ſubjects which had belonged to *George Arkle* dyer in *Strathaven*, and were conveyed to *Allan* in ſecurity of a debt. On the other hand, *Young* and *Miller* obliged themſelves to pay to *Allan* the principal ſum of his debt, extending to 2950 merks, with the bygone intereſt, and expences incurred in ſecuring the ſame, all to be accumulated at *Whitſunday* 1750, " with a fifth part of the ſaid ſum ſo accumulate, of pe-" nalty and liquidate expences, in caſe of failzie." The contract contained other conditions; and concluded with an obligation on both parties to perform the premiſſes *hinc inde*, " under the penalty of *L.* 10 " *Sterling*."

The purpoſe of this contract was, that *Young* and *Miller*, as truſtees for *Arkle* and his perſonal creditors, ſhould, with *Young*'s concurrence, bring the ſubjects to a roup; and in caſe of their yielding more than *Allan*'s debt, apply the ſurplus for payment of the other creditors.—By the contract itſelf, *John Marſhal*, *Allan*'s agent, was appointed clerk to the intended roup; and by a ſeparate miſſive addreſſed by *Allan* to *Young* and *Miller*, he declared, that in caſe the ſubjects ſhould not ſell above the extent of his debt, he would, upon their application, free them from the engagements they had undertaken by the contract; but thus qualified, " I always being put *in ſtatu quo* as I was preceding this " date, you making intimation to me of your not chuſing to hold bar-" gain with me, on or betwixt and the 25th of *March* next."

The ſubjects were, in the beginning of *March* 1750, expoſed to roup. *John Scot* offered for them 3820 merks; and *James Stevenſon* having offered 3900, was preferred to the purchaſe. Both theſe offers conſiderably exceeded the extent of *Allan*'s debt: but no caution was found by *Stevenſon*, in terms of the articles of roup; nor did *Marſhal*, the clerk, inſiſt againſt *Scot*, the next bidder, agreeable to thoſe articles.—*Young* and *Miller* thereupon reſolved to throw up their concern, and get free of the contract. They made an intimation thereof to *Allan* three days before the time limited for that purpoſe by *Allan*'s miſſive.

Allan however refuſed to paſs from the contract, and charged *Young* and *Miller* with horning to implement the ſame, particularly to pay him the ſum thereby ſtipulated, as the price of the ſubjects, *with a fifth part more* of penalty, as incurred through failzie, and alſo to pay the mutual penalty of *L.* 10 *Sterling* likewiſe therein contained.

Young and *Miller* obtained a ſuſpenſion of the charge; in diſcuſſing which, they *inſiſted*, That as the roup had proved ineffectual for anſwering the intended purpoſes, and they had intimated their reſiling from the contract in due time, they were not liable in the obligations thereof. *Allan anſwered*, That they were debarred from reſiling by the roup, which left matters no longer entire; ſo that he could not be put *in ſtatu quo*, as the purchaſer might ſtill inſiſt for implement of the articles.——The Lord Ordinary, by two conſecutive interlocutors, " ſuſtained " the reaſons of ſuſpenſion;" to which the Lords adhered. But upon a ſecond reclaiming petition for *Allan*, they were pleaſed to " find the " letters orderly proceeded, and decern." And *Young* and *Miller* having then reclaimed, the Lords, on the 19th of *December* 1755, " ad-" hered to their laſt interlocutor, and refuſed the petition."

When theſe interlocutors were pronounced, neither party applied to the court for recovering expences from the other ſide; but during the vacation, which followed ſoon after the laſt interlocutor, *Allan* extracted

the decreet, in the preciſe terms of the charge upon which it proceeded, namely, decerning *Young* and *Miller* to pay him, not only the accumulate ſum ſtipulated by the contract, but alſo the *fifth part* more, and the other mutual penalty of *L.* 10 *Sterling*, as incurred through failzie.

Young and *Miller* offered payment of the principal ſum, intereſt, and expences of ſecurity; but *Allan* likewiſe inſiſting for the whole penalties, as an indemnification of his expences of plea incurred in ſupporting the validity of the contract, *Young* and *Miller* obtained a new ſuſpenſion as to theſe penalties; and thereupon *Allan* took payment of the principal ſum and intereſt.

Pleaded for *Allan*, the charger,

1*mo*, Penalties were introduced into our law, to furniſh a ſecurity to the creditor, which he might hold for indemnifying him of all expence and damage ſuſtained through delay or ſtop of payment in any way whatever. In ſtrict law, the whole penalty is due *ex forma verborum*, whenever the debtor allows the term to paſs without payment or performance; and hence an adjudication is legally and validly led for the whole penalty the day after the term of payment. The Lords indeed do ſometimes modify exorbitant penalties; but in ſo doing, they act *ex nobili officio*, and take every equitable circumſtance under conſideration, ſo that all loſs ariſing to the creditor by the debtor's not explicitly performing his obligation may be repaired. Thus, where a bond bore a penalty, but no ſtipulation that annualrent ſhould be paid, the penalty was allowed to be exacted to the extent of the intereſt; 29th *November* 1622, *Sempill*. Upon the ſame ground, in this caſe, the expences incurred by the charger, in maintaining the validity of the contract, having exceeded the penalties, he is in equity intitled to exact theſe penalties for indemnifying him ſo far, and otherwiſe he would be a conſiderable loſer.

2*do*, The charger *pleads* a *res hactenus judicata*, by the extracted decree of the court, decerning for payment of the penalties, as well as the principal and intereſt. If the ſuſpenders thought themſelves aggrieved by the laſt interlocutors, whereon that extract proceeded, with regard to the penalties, they ought to have applied in due time; which they did not; whereby the decree became final. And,

3*tio*, Suppoſing the caſe open to review, yet decreet would ſtill fall to be pronounced for the penalties, not only as due *ex pacto*, as well as the principal and intereſt, but in reſpect of the circumſtances of the caſe, which ſhow, that the charger was unneceſſarily put to expences exceeding the penalties, in litigating the objections made by the ſuſpenders to their being bound by the contract, which now ſtand finally over-ruled.

Anſwered for the ſuſpenders, 1*mo*, Conventional penalties have been always conſidered as highly unfavourable; ſo that both law and equity have concurred in reſtricting them. Though due *ex obligatione*, yet they have been confined to the reparation of that damage which the creditor appears to have truly ſuſtained by non-performance. In the caſe of adjudications, the law ſpecially allows either a fifth part of the principal ſum more, or the conventional penalty, to be adjudged for, according as a ſpecial or general adjudication is ſuffered to paſs, in order to indemnify the creditor for the loſs he is ſuppoſed to ſuſtain by being obliged to take land for his money. But that is a peculiar privilege given

given by ſtatute to adjudgers; and in no other caſe is a creditor allowed arbitrarily to exact penalties, without having incurred to the extent of thoſe penalties the damage or expence thereby properly intended to be repaired. Intereſt is always underſtood to be due on a bond-debt; and thence, in *Sempill*'s caſe, the penalty was rightly taken, to ſupply the want of a ſtipulation of intereſt in the bond. Expences of plea ſtand on a quite different footing. Theſe are in no caſe due or exigible, unleſs the court finds that a party has been litigious, and ſpecially ſubjects him to the coſts of his opponent, *in pœnam* of his offence. It is only the charges of expeding ſecurities, or doing diligence for recovery of a debt, that are meant to be reimburſed by conventional penalties in bonds or contracts, (whereon no adjudication is led), as ſuch only are held to be ſtrictly neceſſary, and in the view of parties at contracting, and not expences of plea incurred in trying the queſtion, whether the ground of debt is effectual or not?

2*do*, There is not here a *res judicata*, as to the exacting the penalties for indemnification of thoſe expences. The court never had before the queſtion as to ſuch expences under conſideration. The words of the interlocutor were in the common ſtyle, *finding the letters orderly proceeded, and decerning*. The more particular decerniture in the extract, for the penalties, was the operation of the extracter, in reſpect of the terms of the charge given for them, as well as for the principal ſum and intereſt. As no expences of plea were ſpecially awarded by the court, the ſuſpenders had no occaſion to apply for relief of ſuch expences, or to apprehend that the ſame would be demanded under the denomination of penalties.

And, 3*tio*, It is indeed true, that upon the reaſons for ſuſpending the contract being repelled, decreet muſt have paſſed, if demanded, for payment of the penalties, as well as of the principal ſum and intereſt, in the preciſe terms of the contract; becauſe it could not be foreſeen what expences might afterwards be incurred, in doing diligence for recovery of the debt thereby properly due, or whether the charger might not be obliged to adjudge. But ſuch decerniture could not be underſtood to make the ſuſpenders liable in the actual payment of the penalties, whether diligence of that kind ſhould be done or not, or to make them liable in the expences of plea already incurred in diſcuſſing the previous queſtion as to the validity of the contract; and as the contract is now implemented, by payment of the principal ſum and intereſt, the penalties muſt fall of courſe, as no expence of diligence can be hereafter incurred. Neither is there room for ſtill awarding coſts of ſuit againſt the ſuſpenders, in reſpect of the circumſtances of the caſe itſelf, independent of the conventional penalties, as the ſuſpenders were not litigious, but had at leaſt a *probabilis cauſa litigandi*; which is proved by their obtaining two interlocutors of the Lord Ordinary, and one of the whole Lords, in favour of their plea.

" The Lords ſuſtained the reaſons of ſuſpenſion, as to the penalties."

D. R.

Act. *Macqueen, Advocatus.* Alt. *Rae.*

N° LXXVIII.

N° LXXVIII. 1st *February* 1757.

TRUSTEES for repairing the TURNPIKE-ROADS from NORTH QUEENSFERRY to PERTH,

AGAINST

The MAGISTRATES and TOWN-COUNCIL of PERTH.

Inhabitants of royal boroughs found liable in ſtatute-work on the high-ways.

THE 8th act, parl. 1617, authoriſed the juſtices of peace "to give "order, as they ſhall ſee moſt convenient, and *with leaſt grief to* "*the ſubject*, for mending of all highways and paſſages to or from "any market-town or ſea-port *within the ſhire*;" with a diſcretionary power, of cenſuring or puniſhing thoſe who refuſe to concur in mending ſuch highways or paſſages.

The ſame powers were given to the juſtices of peace by the 38th act, parl. 1661.

By the 16th act, parl. 1669, the juſtices were required "to convene "*all tenants and cottars, and their ſervants*, who are to have in readineſs "horſes, carts, ſledges, ſpades, ſhovels, picks, mattocks, and ſuch "other inſtruments as ſhall be required;" and to work upon the highways during certain days yearly, "*betwixt the bear-ſeed, and hay-time*, "*or harveſt*." The juſtices were moreover impowered "to poind the "readieſt goods of the abſents, — without further ſolemnity, but ap-"priſing the ſame *upon the ground of the land*."

And "becauſe *the work of the inhabitants within the ſeveral bounds* "will not be able ſufficiently to repair the highways," the act ordained the heritors of each ſhire, "*comprehending the heritors of the borough-*"*lands therein*," to be aſſeſſed in a certain ſum yearly, according to their valued rent.

The act 9. parl. 1670, allowed the juſtices to compound, in certain circumſtances, with the perſons liable in the ſtatute-work.

By an act *5to Geo.* I. the juſtices, and the commiſſioners of ſupply, were ordained "to convene the tenants, cottars, and *other labouring* "*men* within their bounds," for the repairing of the highways, "to "work three days before the laſt day of *June*, *not being in ſeed-time*, and "three days *after harveſt*."

An act paſſed 26*to Geo.* II. for repairing the highways between *North Queensferry* and *Perth*: certain tolls were thereby appointed to be levied, and, for the execution of the act, truſtees named; among whom are, "*the principal magiſtrates of each royal borough within theſe bounds*, *of the* "*counties of* Perth *and* Fife."

It was thereby enacted, "That all perſons who are by law charge-"able towards repairing the ſaid roads, ſhall remain chargeable, and "do their reſpective works, upon ſuch roads as the truſtees, or any three "of them, ſhall direct."

The act, moreover, contains the following clauſes.

"And

" And for removing all doubts and queſtions that may ariſe, concerning who are liable in performing the ſervices aforeſaid, it is further enacted and declared, That *every heritor labouring and poſſeſſing his own grounds*, ſhall be obliged to aſſiſt at repairing the highways." As alſo, " That all *carters, and brewers, occupying carts, reſiding in the counties aforeſaid*, ſhall be obliged to perform their ſeveral ſervices at the reſpective high-roads, at ſuch times, and for ſuch days, as are preſcribed by law; and that *every houſeholder, cottager, and labourer*, within the ſaid counties reſpectively, ſhall work on the highways, by himſelf, or another employed by him, for the days, and under the penalties, as are already preſcribed by law."

A quorum of the truſtees named by this act, charged certain houſeholders in the royal borough of *Perth*, to ſend each of them a perſon to work on the foreſaid highways. The magiſtrates and town-council of *Perth*, on behalf of the houſeholders, ſuſpended this charge.

Pleaded for the ſuſpenders, Neither by the general laws concerning the repairing of highways, nor by the particular act 26*to Geo.* II. are the inhabitants of a royal borough liable in the ſtatute-work.

The ſituation of the roads to be repaired, the deſcription of the perſons who are bound to repair them, the ſeaſons of the year at which they are called out, the inſtruments with which they are to come furniſhed, the penalties laid on thoſe who abſent themſelves, the manner of levying ſuch penalties, the nature of the ſubſidiary fund provided for repairing the highways, and the practice in *Scotland* as to the execution of thoſe laws, all concur in ſhewing, that the general laws meant to impoſe this burden on the inhabitants of the country, and the poſſeſſors of predial tenements, but not on the inhabitants of royal boroughs.

The *roads* to be repaired lie in the country, and paſs through the grounds poſſeſſed by countrymen: it is natural, therefore, to oblige countrymen to repair them. Other, and very different ſervices, are impoſed upon royal boroughs: they are bound to repair the cauſeways within their territories, to perform watching and warding, and to quarter ſoldiers.

The *deſcription* of the perſons bound to repair the highways, is limited to thoſe who reſide in the country. The act 1669 mentions *tenants and cottars*; that is, men who poſſeſs and labour grounds. The act 5*to Geo.* I. adds, *other labouring-men:* This expreſſion, in common language, relates to men who gain their liveliehood by country-work.

The *ſeaſons* of the year allotted for the ſtatute-work, are thoſe which are moſt convenient for labouring-men.

The *inſtruments* with which thoſe liable in the ſtatute-work muſt be provided, are ſuch as are uſed by perſons occupying lands; but which the inhabitants of boroughs ſeldom poſſeſs, and ſeldom can uſe.

The *penalties impoſed* by the act 1669 on abſentees, prove, that all who are called out are ſuppoſed capable of ſuch work. Now, it is certain, that moſt of the inhabitants of boroughs are not.

The penalties are to be levied *on the ground* of the land: it follows, that the abſentees were underſtood to reſide there, and not in boroughs.

The *ſubſidiary* fund for repairing the highways is to be levied from the *heritors*, becauſe *the work of the inhabitants within the ſeveral bounds*

is not ſufficient for executing the purpoſes of the law, and it is reaſonable, that the *proprietors of the ground* ſhould finiſh what *the poſſeſſors of the ground* leave uncompleted.

And with reſpect to the *execution* of thoſe laws, the inhabitants of royal boroughs have from time immemorial been exempted from the ſtatute-work.

Such was the intendment of the general ſtatutes for repairing the highways, and it does not appear that the particular ſtatute 26*to Geo.* II. meant to change the general law; this will not be preſumed, eſpecially in an explanatory ſtatute. The expreſſion, *houſeholders, cottagers, and labourers*, is taken from *Engliſh* ſtatutes; but as reference is made to the laws of *Scotland*, for determining the extent of the ſervice, and of the penalty on default, ſuch expreſſion muſt be interpreted according to the laws of *Scotland*. There are many perſons reſiding in the country, and fit to perform the ſtatute-work, who yet are not *tenants* nor *cottars*, nor, in ſtrictneſs of ſpeech, *labouring-men:* it may therefore have been proper to vary the words of the ſtatutes 1669, and 5*to Geo.* I. and to comprehend ſuch perſons under the general denomination of *houſeholders*. But *houſeholders* cannot mean all who poſſeſs houſes; for all heritors poſſeſs houſes, and yet all heritors are not called to work by the act 26*to Geo.* II. but only certain heritors, and they too in virtue of a ſpecial clauſe.

Beſides, *houſeholders within the county*, does not comprehend the inhabitants of a royal borough; for, in law, the *county* and the *borough* are contradiſtinguiſhed. Thus the ceſs impoſed upon a *county* includes not the ceſs impoſed upon a *borough:* thus the juſtices of peace are authoriſed to licence ale-houſes within their reſpective counties; and yet the power of licenſing ale-houſes within royal boroughs is given to the magiſtrates.

Pleaded for the chargers, The acts 1617 and 1661 lodge a diſcretionary power in the juſtices for repairing the highways, *with the leaſt grief to the ſubject*. In the later ſtatutes, the deſcription of the perſons whoſe work was particularly required, is indeed leſs extenſive; but there is no exemption provided to the inhabitants of royal boroughs. Neither does there ſeem any reaſon for exempting them. They are frequently tenants and labouring-men, as well as thoſe reſiding in the country are. The inhabitants of royal boroughs, by the goods which they tranſport, and by the heavy carriages which they uſe, break the highways as much as they who reſide in the country do; and they have more benefit from them when repaired.

The particular ſervices performed by royal boroughs cannot exempt them from the ſtatute-work. The *reparation of cauſeways* is an obligation incumbent on them by their charters; and for this end petty tolls are generally in royal boroughs, and eſpecially at *Perth*, eſtabliſhed: the ſervice of *watching and warding* is the *reddendo* of the charters of royal boroughs, and at the ſame time is calculated for their own conveniency and ſecurity: the *quartering of ſoldiers* is not a permanent burden, but in conſequence of annual ſtatutes; and it is impoſed, in common with royal boroughs, upon market-towns, who pretend to no exemption from the ſtatute-work.

Whatever may have been the caſe formerly, when the repairing of highways was much neglected, it is certain, that of late years the in-

habitants of royal boroughs have not been exempted from the ſtatute-work; and in the only caſe where this exemption was pleaded, the court repelled it; 24th *July* 1750, *Robert Hamilton* againſt *the inhabitants of Kirkaldy*.

But although ſuch exemption were to have been ſuſtained upon the general ſtatutes, it cannot upon the particular ſtatute 26*to Geo.* II. *Houſeholder*, in common ſpeech, implies one who poſſeſſes a houſe: and were it to be reſtricted to the ſenſe for which the ſuſpenders plead, it would be a ſuperfluous word; for perſons reſiding in the country could pretend to no exemption before that act paſſed. A *houſeholder within the county* muſt comprehend a houſeholder in *Perth*: for whenever the law means to diſtinguiſh between boroughs and the reſt of the country, it marks the diſtinction. Thus, in the *juriſdiction* act, juriſdictions competent to royal boroughs are expreſsly excepted. But when this diſtinction is not made, *county* or *ſhire* includes *borough*; as in the 36th act, parl. 1663, eſtabliſhing a militia; and in the 39th act, 19° *Geo.* II. "for the more effectually diſarming the highlands," the ceſs of the *county* is diſtinguiſhed from the ceſs of a *borough*; becauſe the law impoſes a certain proportion of the ceſs upon the boroughs, diſtinct from what is impoſed on the counties. Beſides, if *county*, in the 26*to Geo.* II. did not include *royal boroughs*, "the principal magiſtrates of "each royal borough within theſe bounds, of the counties of *Perth* and "*Fife*," could in no reaſon have been appointed truſtees for the execution of the act.

"The Lords found the ſuſpenders liable in the ſtatute-work of the "turnpike-road in queſtion." W. J.

For the ſuſpenders, *J. Craigie, Advocatus.* Alt. *Lockhart, Ferguſon.* Reporter, *Banlton.*

N. B. *This caſe being omitted to be inſerted at the date of the interlocutor, is here inſerted at the end of the year.*

N° LXXIX. 4th *January* 1758.

JOHN RAMSAY of AUCHTERTYRE,

AGAINST

The Reverend Mr JOHN GOWDIE.

The effect of the legitimation of a baſtard as to his agnate's ſucceſſion to him;—or to his children in lands by them acquired.

MR *John Gowdie* having obtained from the crown a gift of *ultimus heres* to the lands of *Maiſon-Dieu*, the property of the deceaſed *Margaret Moriſon*, who, he alledged, had died without heirs, *John Ramſay* brought a declarator to exclude this gift, in reſpect that *Margaret Moriſon* had not died without heirs, and that he was next heir to her.

He connected his relation, by ſhowing, that *Margaret Moriſon* was deſcended from and heir to *James Moriſon*, who was her great-grandfather;

father; and that he himſelf was deſcended from and heir to *Marjory Moriſon*, the only ſiſter of this *James*.

Gowdie's *defence* was, That *James Moriſon* was a baſtard; and, conſequently, that *Ramſay* could not ſucceed either to him or to any of his deſcendents; becauſe, by the law of *Scotland*, a baſtard can have no heirs except thoſe of his own body.

To obviate this, *John Ramſay* produced letters of legitimation in favour of *James Moriſon*, of date 30th *June* 1625. Theſe letters are in the common ſtyle; and in them King *Charles* I. gives and grants to *James Moriſon* in the following words, " plenariam poteſtatem, libe-
" ram facultatem, et licentiam ſpecialem, ut ipſe libere et licite diſ-
" ponere valeat, quovis tempore vitæ ſuæ, ſive æger fuerit, ſive ſanus,
" *ſive in tempore mortis ſuæ*, de omnibus et ſingulis terris *ſuis*, tene-
" mentis, annuis redditibus, aſſedationibus, prædiis et poſſeſſionibus,
" ubicunque, infra dictum regnum noſtrum, ſive extra idem, exiſten.;
" ac de omnibus et ſingulis *bonis ſuis, mobilibus et immobilibus, quæſitis*
" *ſeu quærendis*, cuicunque perſonæ, vel quibuſcunque perſonis, prout
" ipſi magis videbitur expediens, conveniens, et opportunum, non ob-
" ſtante baſtardia, in qua genitus et natus eſt, et privilegio juris no-
" bis ſuper baſtardorum eſchetis conceſſ.; ac etiam ipſum Jacobum
" Moriſon ad *omnimodos actus legitimos, in judicio, et extra judicium, ex-*
" *ercendi, dignitatibus, hereditatibus, terris, privilegiis, honoribus, offi-*
" *ciis, et poſſeſſionibus gaudendi, in omnibus, et per omnia, ſicuti de legiti-*
" *mo thoro procreatus fuiſſet*, legitimum fecimus, et, noſtræ Regiæ Ma-
" jeſtatis plenitudine, legitimamus.—— Et ſi contigerit, dictum Jaco-
" bum Moriſon, ſine legitimis heredibus de corpore ſuo procreatis, vel
" ſine diſpoſitione, per ipſum, de terris *ſuis* et bonis antedictis, facta,
" in fata decedere; nos, ex noſtra regia poteſtate, et authoritate regali,
" volumus et concedimus, et, pro nobis et ſucceſſoribus noſtris, de-
" cernimus et ordinamus, *quod propinquior agnatus vel cognatus ſuus,*
" *ex parte patris vel matris, erit ipſius heres*, eique, in omnibus *ſuis*
" terris, redditibus, poſſeſſionibus, et bonis hereditariis, mobilibus
" et immobilibus, habitis et habendis, ſuccedet, et ad eadem, per
" brevia capellæ noſtræ regiæ, introibit, *ſimili modo, et adeo legitime,*
" *vigore hujus noſtræ legitimationis, ac ſi prædictus Jacobus Moriſon de le-*
" *gitimo thoro procreatus fuiſſet*, vel hæredes de corpore ſuo legitimo
" procreatos habuiſſet, aut ſuper dictis terris et bonis *ſuis* in vita ſua
" diſpoſuiſſet, ſine aliquo obſtaculo, revocatione, impedimento, cla-
" meo, quæſtione, vel contradictione noſtri, vel ſucceſſorum noſtro-
" rum, præfato Jacobo Moriſon, aut perſonæ vel perſonis cui vel qui-
" bus ipſi, de præfatis terris *ſuis*, tenementis, annuis redditibus, poſ-
" ſeſſionibus, vel bonis, diſponere contigerit, ſive propinquiori agnato
" vel cognato ſuo, ex parte patris vel matris; quibus deficientibus, le-
" gitimis heredibus de corpore ſuo; vel diſpoſitione, per ipſum, in
" vita ſua, ut præmittitur, minime facta, in terris, hereditatibus, et
" bonis *ſuis*, antedictis, ſuccedet, quovis modo inde fiendi in fu-
" turum, non obſtan. juris privilegio nobis ſuper eſchetis baſtardo-
" rum, ut præmittitur, conceſſ. aliiſque juribus canonicis, civilibus,
" et municipalibus, conſuetudinibus, parliamentorum actis, conſue-
" tudinibus, vel ſtatutis, in contrarium quibuſcunque, renunciando
" eiſdem, pro nobis et ſucceſſoribus noſtris, in perpetuum. Præterea,
" damus et concedimus, et pro nobis et ſucceſſoribus noſtris, nunc

" prout

" prout tunc et, e converſo, *quietclamamus et transferamus*, in et ad " prædictum Jacobum Moriſon, et perſonam vel perſonas cui vel qui- " bus ipſum de terris, hereditatibus, et bonis *ſuis*, antedictis, diſpo- " nere contigerit; nec non in et ad propinquiorem agnatum et cogna- " tum; quibus deficientibus, legitimis heredibus de corpore ſuo, ei " ſuccedere contigerit in eiſdem, *totum jus et clameum, juris titulum, pla-* " *citum et quæſtionem, quæ et quas nos, vel ſucceſſores noſtri, habemus, vel* " *quovis modo habere vel clamare poterimus, ſine aliquo obſtaculo.*"

From theſe letters of legitimation, *Ramſay contended*, That he, as the next agnate to *James Moriſon*, had a right to ſucceed to him. He *pleaded*, That the *macula natalium*, or ſtain of baſtardy, with all its conſequences, was removed by the letters of legitimation, which are intended to mitigate the hardſhips and incapacities whereto baſtards are ſubject by the common law. That the law of *Scotland*, with reſpect to legitimation, was the ſame as the *Roman* law, and the laws of *France* and *Holland*; the royal prerogative being always underſtood to extend to giving the baſtard all rights of a free citizen, except that of inheriting to his father, or collateral relations. That the words of letters of legitimation, whereof great numbers appear in the records for two hundred years paſt, are almoſt uniformly the ſame with the preſent ones; and give to their agnates on the father's ſide, and their cognates on the mother's ſide, a right to inherit from the baſtard in default of iſſue of his own body. It ſignifies little whether the ſovereign power could reſtore the blood ſo entirely as to create relations on the father's ſide to a baſtard; it is enough, that he can do an equivalent act, by giving to the ſuppoſed agnates of the baſtard a right of inheriting from him. By beſtowing this right the ſovereign hurts no third party, as he diſpoſes only of an eſtate, to which himſelf would otherwiſe be in law intitled, in the ſame manner as if it had actually eſcheated through baſtardy or *ultimus heres*. That a gift of this nature was equally effectual, although the benefit of it did not take place, in favour of the grantee and his heirs, but at a diſtant period. That the ſovereign could by law make an effectual grant of the caſualties of ſuperiority not annexed to the crown, as well thoſe ariſing in his own, as in future time; and could, in the ſame manner, diſpoſe of the eſcheat of baſtardy, and *ultimus heres*, which are not part of the annexed property, to take place at a diſtant period.

Anſwered for *Gowdie*, That the form of the letters of legitimation had been borrowed from the form uſed in *France*; but *that* form could not receive effect in the law of *Scotland*. Thus, for example, they give right to the cognates, or relations upon the mother's ſide, to ſucceed to the baſtard; yet by the law of *Scotland* there is no ſucceſſion on the mother's ſide; and with this law the ſovereign cannot diſpenſe. In the ſame manner, they impower the baſtard to diſpoſe of his real eſtate even on deathbed; yet by the law of *Scotland* he cannot do ſo; and with this law the ſovereign cannot diſpenſe. — The extent to be given to theſe letters is to be found, not in their form, but in the law-books: *Craig*, *lib.* 2. *dieg.* 18. *paragr.* 10. and 13. gives his opinion in point againſt the effect of the letters contended for; and *Skene*, *voce Baſtardos*, and Lord *Stair*, *lib.* 3. *tit.* 3. § 44. ſuppoſe the only effect of thoſe letters is, to give the baſtard a power to teſt. — That from a vaſt variety of inſtances in the records, it appears, that notwithſtanding letters of legi-

timation as extenſive as the preſent; yet, on the death of ſuch legitimated baſtards without iſſue, or without ſettlement of their eſtates, the ſovereign had uniformly ſeized, or granted them, as fallen to him, *ratione baſtardiæ aut ultimi heredis*, as by the law of *Scotland* baſtards could have no agnates inheritable to them. Nor could any precedent be ſhown of a ſervice to a baſtard by his ſuppoſed agnates, nor any retour of ſuch ſervice upon record; which two things afford the ſtrongeſt evidence, that ſuch agnates had no claim, either from the general law of legitimation, or the particular words of the grant. — That both by the common law, and by ſeveral ſtatutes, the ſovereign was reſtrained from diſpoſing, by anticipation, of eſtates, which, in a diſtant event, might be forfeited or eſcheated; nor could he grant away future and contingent caſualties of the crown, in prejudice of his ſucceſſor.

"The Lords found, That by the letters of legitimation, the agnates "of *James Moriſon*, the baſtard, were intitled to ſucceed to *James* "*Moriſon*'s eſtate, heritable and moveable."

John Gowdie afterwards ſet forth to the court, That he had diſcovered, that the lands of *Maiſon-Dieu* were never the eſtate of *James Moriſon*, but had been the eſtate of his ſon *Samuel Moriſon*; and from thence he *contended*, That as the preſent letters of legitimation only provide, that the agnate ſhall ſucceed to *James Moriſon*, *in terris ſuis et tenementis quæſitis ſeu quærendis*, the agnates cannot take *terras* or *tenementa* that were never in his perſon, but only in that of his ſon; and that grants of this nature ought to be ſtrictly interpreted.

Anſwered for *Ramſay*, The letters of legitimation are in moſt ample form, and ſpecially provide, that if the baſtard ſhall die without heirs, his father's neareſt agnate ſhall ſucceed, as if he, the baſtard, had been born in lawful wedlock; and the King thereby renounces, for himſelf and his ſucceſſors, all right that can accrue to them by *James Moriſon*'s having been a baſtard: That grants of this nature, which do not hurt any third party, and where nothing is given away but what would accrue to the crown, ought to be liberally interpreted: That though the eſtate in queſtion had not been eſtabliſhed in the perſon of *James Moriſon*; yet as *James Moriſon* was legitimated, ſo far as that his agnates could ſucceed to him, they were alſo intitled to take any eſtate which belonged to his ſucceſſors. —— Further, That by a particular clauſe in the grant of legitimation, *James Moriſon* was made capable *ad omnimodos actus legitimos, in judicio et extra judicium, exercendi, dignitatibus, hereditatibus, terris, &c. gaudendi, ſicuti de legitimo thoro procreatus fuiſſet, legitimum fecimus, &c.* That by this clauſe he was intitled to ſucceed and take, and to be ſucceeded to by his deſcendents; and *John Ramſay*, his collateral heir, muſt, of conſequence, be intitled to ſucceed, and take, as heir to *Margaret Moriſon*, the lawful deſcendent of *James*.

The Lords found, "That the lands of *Maiſon-Dieu* were not the eſtate "of *James Moriſon*, but the eſtate of his deſcendents; and the "agnates of the baſtard were not, by the letters of legitimation, "intitled to ſucceed thereto; and therefore preferred Mr *Gowdie* "the King's donatar." J. D.

Act. *P. Murray, W. Steuart, Miller, Lockhart.* Alt. *D. Dalrymple, Advocatus, Ferguſon.*

N° LXXX.

N° LXXX. 4th *January* 1758.

ARCHIBALD ARBUTHNOT, and others,

AGAINST

Lieutenant ROBERT ARBUTHNOT.

A legatee is intitled to the profit arising upon his share of the defunct's funds, as well as to the legacy itself.

Robert Arbuthnot, on the 15th of *February* 1752, executed a teſtament in *England*, by which he gave to his wife the liferent of his whole eſtate, and, failing children, divided his fortune into legacies to his wife, and certain other perſons, his relations: *Mary Arbuthnot*, his wife, he named executrix of his will. He died ſoon after.

His only child died on the 27th of *July* 1753; and his wife alſo died in *March* 1754, having firſt made a ſettlement in favour of her ſiſter Mrs *Eliſabeth Arbuthnot*; who having likewiſe died, Lieutenant *Arbuthnot* ſucceeded to her, as neareſt of kin.

The teſtator's eſtate, at the time of his death, conſiſted of *L.* 932 : 8 *s.* of *South-Sea*, Bank, and *India* annuities; and he had alſo *L.* 187 due to him by two moveable bonds, and *L.* 115 not bearing intereſt. — His debts amounted to *L.* 162; ſo that the debts exceeded that part of the executry which did not bear intereſt, in *L.* 47.

Mary Arbuthnot the executrix ſold part of the *South-Sea*, Bank, and *India* annuities before her death; but did not uplift the moveable bonds. — *Eliſabeth*, her ſiſter, ſold the remainder of the ſtocks.

Archibald Arbuthnot and the other legatees *inſiſted* againſt Lieutenant *Arbuthnot*, as repreſenting the executrix, That they were not only intitled to the legacies ſpecified in the will, but to the intereſt from the time of the wife's death, the liferentrix, which would have fallen due upon them if the teſtator's funds had been allowed to remain in the ſtocks; for that there was no neceſſity to have ſold out more than was wanted to pay off the *L.* 47 remaining of the teſtator's debts, after applying his funds which did not bear intereſt.

In ſupport of this claim, the legatees *contended*, That an executor is liable for annualrent of ſums mentioned in the inventory as bearing annualrent, which had been decided 26th of *June* 1705, *Robertſon* againſt *Baillie*. And, at any rate, the diviſion of the teſtator's funds ought to be conſidered as taking place at the time of his death; and therefore the legatees ought to receive their part of the funds, with all the profits attending it.

Anſwered, Intereſt, by the law of *Scotland*, is not due *niſi ex lege vel pacto*; and there is no law by which legatars are intitled to any more than the ſum legated, and they have themſelves to blame, if they do not recover payment immediately after the legacies become due. Nor does an executor find caution to make payment of any intereſt upon the ſums confirmed. The neareſt of kin may indeed have a claim in equity for

intereſt

intereſt upon ſuch of the funds as bore intereſt to the defunct himſelf; but this will not apply to the caſe of a legatee.

" The Lords found, That that part of the defunct's eſtate which " was diſponable by teſtament, is to be divided, at the widow's " death, proportionally amongſt the legatees; and that each lega- " tee is intitled to a proportion of the ſums bearing intereſt at the " teſtator's death, with the intereſt thereof from the widow's " death." W. J.

Act. *Johnſtone.* Alt. *Lockhart.*

N° LXXXI. 9th *January* 1758.

COUTTS AND COMPANY,

AGAINST

ALLAN AND COMPANY.

The literal terms of an obligation corrected from the circumſtances of the caſe.

ON the 14th *September* 1754, *Fairy*, agent for *Coutts and company*, wrote to *Allan and company*, " Gentlemen, I acknowledge to have " ſold from 600 to 800 bolls of north-country meal, crop 1754, good " and ſufficient oat-meal, at 10*s.* 8*d. Sterling per* boll, deliverable at the " harbour of *Irvine*, as ſoon as wind and weather will allow; payable " at *Martinmas* next, and the 1ſt *January*, in equal proportions."

Of the ſame date, *Allan*, in anſwer to this letter, declared his acceptance of the bargain; adding, that the meal ſhould be delivered in three weeks.

Within the time appointed, *Coutts* ſhipped 600 bolls of meal, of crop 1753, from *Portſoy* for *Irvine*, and made offer of it to *Allan*.

Allan not having occaſion for the meal, refuſed it, on this ground, That, in terms of the letter, it was not of crop 1754.

Coutts having brought a proceſs againſt him, he founded his defence on the ſtrict terms of the letters, which bound him to receive meal only of crop 1754.

Anſwered for *Coutts*, The words, *of crop* 1754, had been put in by the inaccuracy of *Fairy*, inſtead of *crop* 1753; that crop 1754 could not be in the intention of parties, becauſe it was impoſſible it could be delivered of that crop from *Portſoy* to *Irvine* in three weeks after the date of the letters; ſeeing the gentlemens farm-victual in that country are not deliverable till betwixt *Yule* and *Candlemas*.

Replied, When an impoſſible condition is annexed to a bargain, the effect of it muſt be, to void the bargain altogether; *l.* 31. *Pand. De obligat. et act.*; *Stair, lib.* 1. *tit.* 3. § 7.; and again *tit.* 10. § 13.

" The Lords found *Allan* liable for the price of the meal offered to " be delivered." J. D.

Act. Sir *John Stuart, Ferguſon.* Alt. *J. Dalrymple, Lockhart.*

N° LXXXII.

N° LXXXII. 9th *January* 1758.

WILLIAM ALEXANDER, caſhier for the *Edinburgh* ropery-company,

AGAINST

ROBERT CUMING ſhipmaſter in *Leith*.

A bill indorſed in ſecurity does not require negotiation.

Robert Cuming became debtor to the ropery-company in ſundry articles, amounting to *L.* 119 : 8 : 8½ *Sterling*. Upon the 25th *September* 1753, he fitted his account with *Alexander Ogilvie*, the company's clerk; and not being in caſh, he indorſed ſome bills to *Ogilvie*, particularly one accepted by *James Cuming* his brother, for *L.* 29 : 9 : 11 *Sterling*; to which he added an acceptance of his own for the balance. *Ogilvie*, on the other hand, gave *Cuming* a copy of his account, with a note of the bills indorſed, and the following docket ſubjoined: "Re- "ceived from Mr *Robert Cuming* in the above bills *L.* 81 : 16 : 8,, with "his own acceptance, of this date, payable in ſix months, for *L.* 37, "4 s. *Sterling*, *which, when paid*, are in full of the above account; "and the ſame is diſcharged for the *Edinburgh* ropery-company."

The company received punctual payment of *Cuming*'s own acceptance, and of the other bills indorſed, excepting *James Cuming*'s bill above mentioned. It became due in *March* 1754; but the accepter being by that time in a ſtate of bankruptcy, the company did not ſtrictly negotiate it, truſting to the indorſer for their payment, in reſpect of the conception of the above docket. In *June* 1754, they proteſted the bill, and raiſed horning and caption upon it.

James Cuming's effects not being ſufficient to pay above eighteen pence in the pound of his debts, the ropery-company brought an action before the high court of admiralty, againſt *Robert Cuming*, for payment of the contents of the ſaid bill.

Cuming, in his defence, *alledged*, That the bill was indorſed *in ſolutum* of the account; and not having been duly proteſted for not-payment, recourſe was not competent againſt him.—The purſuers, on the other hand, *maintained*, That by the docket of the account, it appeared, the bill was only indorſed *in ſecurity* of the debt; and therefore there was no need for exact negotiation to intitle them to recourſe.

The judge found the defender liable in the contents of the bill, with intereſt from the citation.

Cuming, in a bill of advocation, *pleaded*, That it would be of the moſt dangerous conſequence, to overlook a point ſo eſſential to commerce, as the exact negotiation of bills, and to ſuſtain an action of recourſe upon bills not duly negotiated.

Anſwered for the purſuers, The words of the docket, *which, when paid*, clearly imply, that the bill was not taken in payment, but only in ſecurity *pro tanto* of the debt. An aſſignee in ſecurity is not bound to do diligence; neither can an indorſee in ſecurity be ſo bound.

Where a bill is indorſed in payment, or for preſent value, recourſe can only be had upon exact negotiation; becauſe the indorſer is no otherwiſe bound than by the indorſation: but where an indorſation of a bill is given *in ſecurity* of a former debt, or on condition, that, *when paid*, it ſhall operate a diſcharge of it, the indorſation is no more than a corroborative right. The indorſee is only obliged to apply the payment *when made*; and if the bill is not paid, the indorſer is ſtill liable in the original ground of debt.

"The Lords refuſed the bill of advocation." D. R.

Act. *Rae.* Alt. *Montgomery.* Reporter, *Strichen.*

N° LXXXIII. 10th *January* 1758.

JOHN CRAIGIE of KILGRASTON, advocate, ſupplicant.

Factor loco tutoris.

UPon the 5th of *February* 1756, a petition was preſented to the court in name of the Duke of *Buccleuch*, with the concurrence of the Marquis of *Tweeddale* and Counteſs of *Dalkeith*, craving, That a factor *loco tutoris* might be appointed for the management of the Duke's eſtate.

Upon this application, the court pronounced the following interlocutor. "The Lords having adviſed the foregoing petition, they do "nominate, authoriſe, and appoint Mr *John Craigie* of *Kilgraſton*, ad"vocate, to be factor *loco tutoris* to the ſaid *Henry* Duke of *Buccleuch*, "with power to him, to continue the plan of management of the in"fant's eſtate, in the manner the ſame has been formerly in uſe to be "managed; and particularly with power to the ſaid Mr *John Craigie*, "to appoint chamberlains as uſual over the ſeveral different eſtates, "and all other officers neceſſary for extricating the ſaid management, "with the uſual powers; and to ſettle and clear the accounts of the "ſaid chamberlains, or others; and to receive the balance thence "ariſing, or any other debts and ſums of money belonging to the ſaid "Duke; and to lodge the ſaid balances, or any other ſums belonging "to the ſaid Duke, that may from time to time be impreſſed in his "hands by the chamberlains, or others, (after deduction of ſuch ſums "as he ſhall have occaſion to lay out on the Duke's account), in either "of the banks of *Edinburgh*, at ſuch rate of intereſt as can be agreed "on with them, for the Duke's behoof, there to remain until proper "ſecurity ſhall be found, on which ſuch ſums may be laid out by au"thority of this court; and with power to the ſaid Mr *John Craigie*, to "ſettle and clear the accounts of his own management annually before "this court; and, in general, to manage the ſaid Duke's affairs in the "manner preſcribed by an act of ſederunt dated the 13th day of *Fe*"*bruary* 1730, intitled, *Act concerning factors appointed by the Lords on the* "*eſtates of pupils not having tutors, and others*, and in the manner above "directed, until the factory ſhall be recalled by this court, or the "Duke's affairs brought under ſome other adminiſtration, which may

"ſuperſede

" ſuperſede the ſaid factory; the ſaid Mr *John Craigie* always, before ex-
" tract, finding ſufficient caution to be accountable for the effects of
" the ſaid Duke, falling under his adminiſtration, in terms of the ſaid
" act of ſederunt."

In *Auguſt* 1756, Mr *Craigie* applied to the court, deſiring their authority to make purchaſes of the lands of *Reynaldburn*, and others, and to lend money to the Earl of *Hyndford* and *Reynaldburn*. The court remitted to a Lord Ordinary to examine into the facts, and upon his report authoriſed theſe purchaſes and loans, with a quality expreſſed in the following words: " And as to the influence the diſpoſing of the
" monies in the manner propoſed and authoriſed may have on the ſuc-
" ceſſion to theſe ſums in caſe of the Duke's deceaſe, the Lords leave
" that point to the determination of the law, according as the event
" ſhall happen."

Upon the 10th of *March* 1757, the Lord Ordinary, in obedience to a remit from the Lords, authoriſed the purchaſe of the lands of *Eaſter Haycheſters* and *Lairhope*, and others, and a loan of money to Mr *Drummond* of *Pitkellony*.

Mr *Craigie* having afterwards applied to the court for authority to purchaſe the lands of *Howpaſlie* and *Maclair*, and alſo the lands of *Kirkhouſe*, it was *obſerved on the bench*, That it ſeemed to be improper, that the court ſhould interpoſe its authority in this manner to every ſtep of adminiſtration in the caſe of a factor *loco tutoris*: That the act of ſederunt 13th of *February* 1730, had given ſufficient powers, and theſe ought not to be extended: That the court interpoſed in ſuch caſes merely from neceſſity, to prevent the waſte and deſtruction of minors effects, or others who were abſent or incapable; but if the court were to proceed in the manner now propoſed, it might come in time to appropriate to itſelf the ſame ſort of powers and authorities which were exerciſed by the court of chancery in *England*, and would ſoon have the care and direction of a great part of the eſtates in the kingdom; which was not the plan of its original inſtitution, and might be attended with many bad conſequences; in particular, it would certainly put an end to the adminiſtration of minors eſtates by tutors; ſince all perſons would certainly chuſe to act under the authority of the court, rather than upon their own opinion and riſk: That the court had no proper means of examining into facts, nor the ſame checks which were provided by the court of chancery, by means of their inferior officers, to prevent frauds and abuſes: That the diſpoſing of the Duke of *Buccleuch*'s money in this caſe, upon lands or heritable bonds, might alter the courſe of ſucceſſion to the rents of the Duke's eſtate, in caſe he ſhould die in the mean time; and therefore that the court ought to recal and alter the terms of the former nomination of Mr *Craigie*, and allow the matter to be carried on upon the footing of the act of ſederunt 1730.

On the other hand, it was *obſerved*, That, agreeable to the terms of the nomination of Mr *Craigie*, the ſavings of the Duke's eſtate had been lodged in the bank of *Scotland*; and that it muſt continue there till the further orders of the court: That the court cannot therefore avoid going on with what it has begun: That the application of the money, in the manner propoſed, would not alter the courſe of ſucceſſion; for that it muſt be underſtood as done without prejudice of the executors; and

a clauſe to this purpoſe was added in the firſt interlocutor, "authori-
" ſing Mr *Craigie* to make purchaſes, and lend money."

" The Lords, by a majority of votes, remitted to an Ordinary to in-
" quire into the facts ſet forth in Mr *Craigie*'s petition, relating
" to the purchaſe of *Howpaſlie*, *Maclair*, and *Kirkhouſe*; and af-
" terwards, upon a report from the Lord Ordinary, authoriſed Mr
" *Craigie* to make theſe purchaſes."

Act. J. Craigie.

N° LXXXIV. **11th *January* 1758.**

TRUSTEES of GLASGOW TURNPIKE,

AGAINST

INHABITANTS of town of PAISLEY.

If the whole inhabitants of a borough may be called out to repair high-ways?

SOon after the deciſion in the queſtion betwixt the truſtees of the *Perth* turnpike and the inhabitants of *Perth*, (*vid. p.* 136. of this collection), in which theſe laſt had pleaded, That no inhabitant whatſoever of a royal borough, or borough of regality, could be called out to repair the high-roads, and in which the court had found " the inhabi-
" tants ſuſpenders liable in the ſtatute-work of the turnpike-road in
" queſtion," the truſtees of the *Glaſgow* turnpike ordered out ſeveral artificers and tradeſmen of the town of *Paiſley*, to amend the turnpike leading through *Renfrewſhire* to *Glaſgow*.

In a ſuſpenſion of theſe orders, brought by thoſe tradeſmen and artificers, the Lords found, " That the whole inhabitants of the town of
" *Paiſley* may be called out to repair the high-roads in time coming."

The ſuſpenders reclaimed. They did not inſiſt for a general exemption of all the inhabitants within the borough; on the contrary, they yielded, that labouring-men, or people uſed to country-work, even though living in a borough, might be called out; and in ſo far they acquieſced in the deciſion pronounced in the caſe of *Perth*.

But they *pleaded*, That merchants, artificers, tradeſmen, and all others living within a borough who did not come under the deſcription of labouring-men, tenants, cottars, or their ſervants, were not liable in the ſtatute-work; and at any rate, *inſiſted*, That the word *inhabitants*, in the interlocutor, was by far too general, as the law could never mean to put it in the power of the truſtees to call out peers, judges, clergymen, women, *&c.* to the high-roads.

With regard to artificers and tradeſmen, the truſtees *anſwered*, by repeating the arguments which had been uſed againſt theſe claſſes of men in the caſe of *Perth*.

And as to thoſe in higher ſtations of life, whom it was alledged the interlocutor would authoriſe the truſtees to call out, it was *anſwered*, That there were none of them called out by the orders ſuſpended;

and

and if they ſhould afterwards be called out, there was nothing in the preſent deciſion (which regarded not a caſe in which they were parties) to hinder them to offer a ſuſpenſion, and get redreſs, if redreſs was due to them.

" The Lords adhered, and refuſed the petition; reſerving to the in-
" habitants, or any claſs of them who ſhall think themſelves ag-
" grieved, to apply for redreſs, as accords." J. D.

Suſpenders, *A. Pringle.* Chargers, *Ferguſon.*

N° LXXXV. 13th *January* 1758.

JOHN GOLDIE, truſtee of BROADHOLM's CREDITORS,

AGAINST

KATHARINE MACDONALD.

Effect of a decreet in abſence, proceeding upon a reference to oath, and holding as confeſſed.

Katharine Macdonald brought an action againſt *John Henderſon*, concluding, That he ſhould be decerned in the ſum of *L.* 400 *Sterling*, uplifted by him out of *Andrew Garden*'s executry, in virtue of powers from *George Keir* her huſband; or, at leaſt, that it ought to be found and declared, That the ſaid *John Henderſon*, either wilfully, or by ſupine negligence, neglected to expede *Andrew Garden*'s teſtament-dative; during which time her huſband died, and his brother carried off the whole executry, by which ſhe had ſuffered damage; and that therefore the defender ought to be decerned in *L.* 400 *Sterling*, as the value of her huſband's ſhare of *Garden*'s executry.

No proof was produced with regard to the extent of the damages; but her procurator declared at the bar, that, in ſo far as the ſummons was not proved by writ, he referred it to the defender's oath. No appearance was made for *Henderſon*, and decree was pronounced againſt him in abſence.

Upon this decree an adjudication was afterwards obtained; but the ſum was reſtricted in the adjudication to *L.* 212.

The court having found, That *Henderſon*'s neglect was ſuch as to ſubject him in damages, (ſee N° 2. of this collection), this objection againſt the decree of conſtitution was afterwards ſtated in a petition for the creditors of *Henderſon*, That it had proceeded without any evidence: That decrees in abſence, as well as decrees *in foro*, muſt either be ſupported by a proof in writing, or by the oaths of witneſſes, or by holding the defender as confeſſed *in facto proprio*, otherwiſe the decree is intrinſically null: That, in the preſent caſe, no proper evidence in writing was produced, with regard to the extent of the executry; nor were any witneſſes examined; but the whole reſted upon a reference to the defender's oath; and the decree proceeded upon holding him as confeſſed, in conſequence of that reference: but the fact upon which he was held as confeſſed, ſo far as it regarded the extent of the executry of *Garden*, was not the proper

ſubject of a reference, upon which the defender could be held as confeſſed; it was a fact with which he could not be acquainted; and therefore could not have made oath, had he appeared in the proceſs: in this ſituation, the purſuer ought to have taken a term for proving the libel, and have brought evidence of the extent of her claim, before inſiſting for decree; and therefore this decree in abſence was intrinſically null for want of evidence.

In ſupport of this, a deciſion was referred to, 28th *December* 1708, *Philip*, " where a baron having convened and decerned his tenant, in " his own court, for bygone terms, and alſo for damages for riving " out ground; and no probation being led, but only the party pre- " ſent, and not contradicting nor objecting; and, in ſupplement of " this decreet, the baron taking another decreet againſt him before the " ſheriff, where no probation was taken but the baron's decreet; the " Lords reduced both the decreets as without probation, and reponed " the tenant to his defences."

" The Lords refuſed the petition without anſwers." W. J.

Act. *Johnſtone.* Alt. *Bruce.*

N° LXXXVI. 13th *January* 1758.

JAMES DONALDSON,

AGAINST

JOHN GRANT, and others, CREDITORS of ALEXANDER REID.

Preference given to a creditor who built or repaired a houſe in virtue of a jedge and warrant.

UPon the 2d of *February* 1726, *Donaldſon*'s father applied to the dean of guild court of *Edinburgh*, ſetting forth, " That he had right " to part of a tenement of houſes on the weſt of *Liberton*'s wynd head, " which had received damage by the burning of certain houſes in the " neigbourhood: That it was neceſſary to have *jedge and warrant* for " rebuilding the tenement; and that the repreſentatives of *Alexander* " *Reid*, and certain other perſons, ſhould be decerned to concur in the " building." After ſeveral ſteps of proceeding before the dean of guild, a judgment was pronounced, 7th *June* 1727, finding, " That jedge " and warrant ought to be granted for taking down and rebuilding, " *&c.*; and therefore granting jedge and warrant accordingly."

In conſequence of this, *Donaldſon*'s father rebuilt, not only his own part of the houſe, but alſo laid out *L.* 40 : 2 : 7 in rebuilding and repairing a ſhop which belonged to the repreſentatives of *Reid*.

The creditors of *Reid* having adjudged this ſubject, brought it to ſale. — *James Donaldſon* appeared, and claimed a preference for the *L.* 40 : 2 : 7 which his father had beſtowed upon the building.

Objected by the creditors, By the law of *Scotland* there is no hypotheck or preference to perſons who lay out their money in building or repairing

repairing houſes, otherwiſe purchaſers and creditors would be inſecure. The creditors in this caſe may have received a conſequential benefit by the expence laid out; but this is not ſufficient to bind them, as *Donaldſon* muſt have laid it out upon the faith of being repaid by *Alexander Reid*'s heirs: and this point was determined 4th *December* 1735, *James Burns contra* creditors of *Maclellan*, obſerved in the Dictionary, *voce Recompence*; and 3d *February* 1680, *John Rae contra Finlayſon*. The creditors alſo obſerved, that the proceedings inobtaining the jedge and warrant had not been ſtrictly regular.

Anſwered, Though no hypotheck is allowed where a perſon repairs or rebuilds the houſe of another, without authority from the dean of guild, which was the caſe decided 4th *December* 1735, *James Burns*; yet it has been eſtabliſhed by practice, that thoſe who lay out money in conſequence of a *jedge and warrant* have a preference to all other creditors. Neither can this be attended with any danger to purchaſers; becauſe, by a ſearch of the records in the dean of guild court, they can always diſcover every debt of this kind. — It may be true, that the jedge and warrant in this caſe was irregular in ſome minute particulars of form; but as to every thing eſſential, it was unexceptionable.

" The Lords found, That the whole tenement whereof the ſhop in " queſtion is a part, being built by the purſuer's father in conſe- " quence of a *jedge and warrant* from the dean of guild, the pur- " ſuer is a preferable creditor upon the ſaid ſhop, for the whole " expence laid out, to all the creditors of *Reid*, whether prior or " poſterior." W. J.

For the creditors, *Ferguſon*. Reporter, Lord *Woodhall*.

N° LXXXVII. 17th *January* 1758.

GRAHAM of BALGOWAN,

AGAINST

The OFFICERS of STATE.

Patronage, if underſtood to be diſſolved from the annexed property, along with the lands to which it was acceſſory?

THE patronage of the pariſh and kirk of *Monydie* was part of the eſtate of the family of *Gowrie*.

Upon the forfeiture of the Earl of *Gowrie* for treaſon, his eſtate was annexed to the crown, by act of parliament 1600, *cap.* 2.: and by this act, " all and ſundry the lands, lordſhips, baronies, benefices, and " others particularly above mentioned, annexed to his Highneſs's " crown, are united to the lordſhip of *Ruthven*, then and in all time " coming, to be called, *the lordſhip and ſtewartry of Huntingtower*."

In the year 1606, an act of diſſolution was paſſed, whereby were diſſolved from the foreſaid annexation " the haill lands pertaining or " belonging to the ſaid earldom of *Gowrie* and lordſhip of *Ruthven*, " and in ſpecial the lands and *lordſhip* of *Huntingtower*, and the lands " of

" of *Strathbran*, that the ſame might be let in feu-farm, and heri-
" tably diſponed, for payment of the old duty, with augmentation of
" the rental."

By charter and infeftment 1607, referring to the above acts of annexation and diſſolution, King *James* VI. granted, in favour of *James Graham* of *Balgowan*, a feu of the lands of *Nether-Pitcairn*, and ſundry others, particularly mentioned, " una cum advocatione, dona-
" tione, et jure patronatus eccleſiæ parochialis de Monydie, rectoriæ et
" vicariæ ejuſdem, cum omnibus et ſingulis cenſibus, decimis, *&c.*" —And a merk *Scots* is added in augmentation of the rental.

The acts of poſſeſſion that have been had of this patronage by the family of *Balgowan* ſince the time aforeſaid, appear to have been as follow. 1*mo*, A preſentation dated the 15th *December* 1662, granted by *Balgowan*, bearing, That Mr *David Drummond*, then miniſter at *Monydie* did ſucceed to that pariſh as parſon and vicar, after the deceaſe of the laſt incumbent; and that the ſaid Mr *David* being eſtabliſhed there according to the law of the land for the time; and ſeeing patronages were revived by a late act of parliament, giving power to all patrons to preſent miniſters that have entered to their kirks ſince the year 1649, or that ſhould enter thereafter; therefore preſenting the ſaid Mr *David Drummond*, the then incumbent, to the parſonage and vicarage of the ſaid kirk of *Monydie*.—— 2*dly*, A gift of the vacant ſtipends of that pariſh in 1694, granted by *Thomas Graham* of *Balgowan*, to certain gentlemen therein named, for building a new bridge upon the water of *Schochie*, and for the repairing the eaſt bridge of *Almond*.—— 3*dly*, A miſſive letter in 1698, wrote by Mr *William Smith*, late miniſter at *Monydie*, to *Balgowan*, bearing, That he, in obedience to a charge of horning given him, had removed himſelf from the manſe; and that he had reſolved to ſend his keys to his patron; and therefore deſiring to receive from the bearer two keys, the one of the hall, and the other of the church.—— 4*thly*, In the year 1717, upon occaſion of a vacancy in the pariſh, one *Gilbert Gardiner*, a truſtee for *Thomas Graham* of *Balgowan*, offered a preſentation in favour of one *James Mercer*; which however was neglected by the preſbytery, who proceeded to moderate a call at large.—— And, *laſtly*, In the 1754, Mr *Patrick Meek* having been ſettled miniſter, upon a preſentation from the King, appearance was made for Mr *Graham* of *Balgowan*, and a proteſt taken, That his not exerciſing his right upon this occaſion ſhould import no acknowledgment of the crown's right.

On the other hand, it appears, that the two laſt incumbents, *viz.* Mr *Gilbert Man*, in the 1738, and Mr *Patrick Meek*, in the 1754, were ſettled upon preſentations from the crown.

Mr *Graham* now of *Balgowan*, having brought an action againſt the officers of ſtate, for declaring his right to the patronage of this church of *Monydie*, did *inſiſt*, That the ſaid patronage had been properly and legally eſtabliſhed in his anceſtor by the charter 1607; that the ſame had been conveyed down by a connected progreſs to the preſent purſuer; and that he and his predeceſſors had uniformly maintained their right by exerciſing all the acts of poſſeſſion which the nature of the thing could admit of; and conſequently no dereliction could be preſumed in favour of the crown, whoſe firſt attempt to reaſſume this right of patronage had been no farther back then the year 1738.

Anſwered on behalf of the *crown*, There are no acts of poſſeſſion on the

the part of the purſuer, or his predeceſſors, ſufficient to ſupport their title to this patronage, if their titles in themſelves are not ſufficient to carry the right to it. The preſentation 1662 bears to be in favour of Mr *Drummond*, the then miniſter of *Monydie*: ſo it is plain, there was no vacancy. And at any rate, this preſentation was a latent deed; no public act of poſſeſſion had followed upon it; nor can it give any ſtrength to a title invalid of itſelf. The only legal and public act of poſſeſſion, or rather attempt to poſſeſs, upon the part of the purſuer, was the preſentation 1717; but which having been altogether diſregarded, muſt go for nothing.

The queſtion, therefore, falls to be determined altogether independent of poſſeſſion; and upon the part of the crown it is *maintained*, That this patronage was not legally conveyed to the purſuer's predeceſſor by the charter 1607; becauſe, by the act 1600, it was unalienably annexed to the crown, and neither was nor could be diſſolved therefrom by the ſubſequent act in the year 1606. The practice of annexing forfeited eſtates to the crown, and thereafter diſſolving them for particular purpoſes, appears pretty early in the parliamentary proceedings of this country. Sometimes eſtates were diſſolved from the crown, with a view of being reſtored to thoſe families or perſons who had loſt them by forfeiture, or given away to others the favourites of the crown; and in ſuch caſes, the diſſolution was commonly made as broad as the annexation, ſo as to comprehend every eſtate in the forfeiting perſon. But more generally diſſolutions were made for increaſing the King's revenue, by feuing out the forfeited and annexed lands at an eaſy rent, though higher than formerly payable by the charters of the forfeiting perſons; and when ſuch was the intention, the practice always was, to reſtrict the diſſolution to the *lands* only, without including offices, juriſdictions, or right of patronages, though ſuch had belonged to the forfeiting perſon whoſe eſtate was then to be diſſolved, and *that* although ſuch particulars had been enumerated in the annexing act, as belonging to the forfeiting perſon. Thus, by the act 112. parl. 1487, act 90. parl. 1593, act 116. parl. 1540, act 30. parl. 1587, and many others, it appears, that although lands, lordſhips, and baronies, with the advocations of their kirks, had been annexed to the crown; yet the acts of diſſolution ſpeak of nothing but diſſolving the lands, in order to their being feued out for the augmentation of the King's rental, and the increaſe of policy upon the lands themſelves. Theſe were the great objects in view; but as no improvement could be made upon patronages, and no rent could properly ariſe therefrom, ſo they are none of the things that were under the conſideration of parliament in theſe acts of diſſolution. By act 1584, *cap.* 6. theſe annexed eſtates, when diſſolved, could not be ſet in feu at a rent under the new retoured duty; but patronages have no retoured duty, therefore could not be meant to be feued out. And indeed, upon looking into the ſtatutes regarding theſe matters, it appears, that the legiſlature ſeldom meant, that patronages once annexed to the crown ſhould be diſſolved therefrom; for in very few inſtances it is done. And the reaſon is obvious: The veſting patronages in perſons diſaffected to the religion of the country, might have been of dangerous conſequence to that peace of and unanimity in religion, ſo much wiſhed for and deſired in the earlier times. And therefore it was agreeable to

the wiſdom of the legiſlature, when the right of patronages came once to be annexed to the crown, to allow them to remain there.

This plan appears to have been followed in the preſent caſe. The act 1600 expreſsly annexes the lands, lordſhip, and barony of *Ruthven*, &c. with the teinds, advocation, donation, and rights of patronage thereto belonging. The act 1606 ſimply diſſolves the lands: it proceeds on a narrative, "That conſidering the ſetting of the lands "of the annexed property and feu-farm for payment of the old rental, "with augmentation, is greatly to his Majeſty's benefit and profit;" therefore the act diſſolves "the haill lands pertaining and belonging to "the ſaid earldom of *Gowrie* and lordſhip of *Ruthven*; and, in ſpecial, "the lands and lordſhip of *Huntingtower*, and the lands of *Strathbran*; "and that to the effect that the ſamen haill lands might be ſet in feu, "with an augmentation of the rental." But no mention is made of the right of patronage; nor could it be in the view of the legiſlature to diſſolve any ſuch right, which could yield no rent or profit by letting it in feu-farm; and therefore both the words and meaning of the act are limited to lands.

2*do*, *et ſeparatim*, Suppoſing patronages had been comprehended in the act of diſſolution, and thereby became alienable by the crown, they ſtill remain ſubject to the rules of law; and it is a rule introduced by act 1593, *cap.* 172. That patronages belonging to the crown cannot be alienated without conſent of the perſon enjoying the benefice for the time. In the preſent caſe, it does not appear that any ſuch conſent was adhibited.

Replied for the purſuer, Rights of patronage have been in the law conſidered as acceſſory to lands, and a pertinent thereof, inſomuch that it has been doubted, if a patronage could be granted without lands to which it was annexed. Where lands, therefore, to which a right of patronage has been always annexed, are in general terms conveyed, the patronage is underſtood to be included; nor is any ſeparate ſeiſin for the patronage neceſſary. In the preſent caſe, upon comparing the act of annexation with the act of diſſolution, it is plain, that in the diſſolving act, no reſervation is made in favour of the crown, but that the whole ſubjects are diſſolved which had formerly been annexed.—By the former of theſe acts, the whole ſubjects which had formerly been in the forfeiting perſon are united into one lordſhip, to be called *the lordſhip and ſtewartry of Huntingtower*. — By the latter act, not the lands only, but the whole lordſhip is diſſolved; which, in fair conſtruction of language, muſt mean the whole particulars ſo united; and one of theſe particulars was the patronage of *Monydie*. — The notion of the danger of patronages being in the hands of ſubjects, is of a very late date, and was not thought of for long after the time of the acts now under conſideration. At that time, neither our kings, nor our parliaments, entertained any ſuch thought; nor was there any inſtance of the crown's giving away lands, and retaining patronages, as is now the cuſtom. It cannot therefore be imagined, that the legiſlature had any view of reſerving this patronage unalienably to the crown, when his Majeſty was intruſted with the diſpoſal of this great eſtate, conſiſting of ſo many lordſhips and baronies. Nor can it be believed, that the King and his miniſters would, within the ſpace of a few months thereafter, have granted a charter of the patronage, if it had not

not been clearly underſtood, that the ſame was diſſolved as well as the lands.

Beſides, the acquieſcence of his Majeſty's officers for ſuch a tract of time, without ever bringing any challenge, either of this charter, or of the ſubſequent rights in the purſuer's family, ſhows plainly the ſenſe that was univerſally entertained with regard to the validity of theſe rights. In a queſtion with a ſubject, all challenge would undoubtedly have been cut off by the negative preſcription; and it does not appear that the crown is in a different ſituation. The act 1600, *cap.* 14. declares, That the King ſhall not be prejudged by the negligence of his officers; which relieves the crown from all objections founded on the forms of judicial proceedings; but does not deprive the ſubjects of the ſalutary relief of the *negative preſcription*, as is obſerved by Sir *George Mackenzie* upon the ſaid act, in reſpect it is a general remedy introduced for the quiet both of King and people; and will not be preſumed to be aboliſhed by ſuch remote implication. And at any rate, if ſuch challenge could be competent after ſo long an acquieſcence, the ground of challenge ought to be made *luce meridiana clarius*, and not to depend upon imaginary conjectures.

With regard to the objection founded on the act 1593, *cap.* 172. In the *firſt* place, it appears from the narrative of this act, as well as from Sir *George Mackenzie*'s obſervations upon it, that it related only to new rights of patronage granted by the King; and therefore does not apply to the preſent caſe. And, 2*dly*, It is well known, that this act went into diſuſe ſoon after it was made, and no regard has ever been had to it: accordingly, in a very late caſe, the very ſame objection which is now made was ſolemnly over-ruled, *January* 1749, *Cochran* of *Culroſs contra* the officers of ſtate.

"The Lords found, That *Balgowan* had right to the patronage of "the kirk of *Monydie*."

W. J.

Act. *John Craigie, Dav. Graeme, Ferguſon.* Alt. King's Counſel. Clerk, *Gibſon.*

N° LXXXVIII. 17th *January* 1758.

DANIEL CUNINGHAM of CAYEN,

AGAINST

MARY GAINER, and SUSANNAH CUNINGHAM, her daughter.

A legacy of a right to lands is effectual againſt the teſtator's heir, who takes benefit from the teſtament in which the legacy is given.

BY minute of ſale, dated 13th *June* 1741, *Thomas Forbes* of *Waterton*, obliged himſelf to diſpone the lands of *Holms of Dundonald* to *Robert Cuningham*, Eſq; for which Mr *Cuningham* thereby became bound to pay *Waterton L.* 1008 : 14 : 2 *Sterling* as the price. It was further declared, That the diſpoſition to be granted, and the lands themſelves, ſhould be burdened with the ſaid price until payment.

Mr

Mr *Cuningham* ſoon after raiſed a ſuſpenſion and reduction of the minute of ſale *ex capite fraudis*. The reaſons of reduction were, however, repelled by two conſecutive interlocutors of the Lords, the laſt of which was pronounced 30th *June* 1743; but a queſtion with reſpect to certain deductions from the price was ſtill in dependence at Mr *Cuningham*'s death, *November* 1743.

By a deed of date 17th *July* 1741, *Robert Cuningham* diſponed to *Mary Gainer* in liferent, and to her daughter *Suſannah* in fee, his lands in *Scotland*, there particularly deſcribed, without mentioning the *Holms* of *Dundonald*.

On the 27th *October* 1743, Mr *Cuningham* executed his laſt will and teſtament, by which he conveyed his eſtate in the iſland of *St Chriſtopher's* (there ſaid to yield *L.* 2500 *Sterling per annum*) to certain truſtees, for payment of his debts and legacies, and in further truſt for *Daniel Cuningham* his ſon, to whom he alſo thereby bequeathed certain other plantations, ſaid to yield *L.* 380 of yearly rent, and his whole other eſtate not diſponed by his will. Among other legacies given by this will, there was one in theſe words. "I give and bequeath unto my dear wife, *Mary* " *Gainer*, (which I have hitherto concealed), all my lands, plate, hou- " ſes, furniture, linens, horſe, mares, bulls, cows, ſheep, and *what-* " *ever I have or ſhall have, in Scotland, at the time of my deceaſe*, for and " during her life, for her maintenance, and for the maintenance and " education of my daughter *Suſannah Cuningham*; and after the deceaſe " of my ſaid wife, I give and bequeath all my lands, plate, *&c. and what-* " *ever I have or ſhall have, in Scotland, at the time of my deceaſe*, unto " my daughter *Suſannah Cuningham*, and the heirs of her body; and " failing ſuch heirs, I give my ſaid lands and premiſſes to my ſon *Da-* " *niel Cuningham*, Eſq; and his ſons for ever."

Robert Cuningham died on the 13th *November* 1743, when the price of the *Holms* of *Dundonald* was not paid; *Waterton* thereupon adjudged thoſe lands, and Mr *Cuningham*'s other land-eſtate in *Scotland*. *Mary Gainer* then brought a ſuit in the high court of chancery againſt the truſtees named in the will, and *Daniel Cuningham*, for performance of the truſt, by relieving the *Scots* eſtate of the debts out of the produce of the *St Chriſtopher's* eſtate. It was *objected*, That the teſtator was not in ſound judgment when the will was made; but after a proof was taken, the Lord Chancellor pronounced his decree in *July* 1750, " de- " claring, That the will ought to be eſtabliſhed, and the truſts there- " of performed; and, in particular, ordering, that the eſtate in *Scot-* " *land* ſhould be relieved of all debts which did or might affect it."

In purſuance of this decree, the truſtees paid the price due to *Waterton*, and took a diſpoſition from him of the *Holms* of *Dundonald*, in favour of *Daniel Cuningham*, his heirs and aſſignees. *Mary Gainer* claimed theſe lands as legated to her, and the tenants called both parties in a multiple-poinding for ſettling their right to the rents.

Objected by *Daniel Cuningham*, That, by the law of *Scotland*, neither lands, nor the right to lands, can be conveyed in a teſtamentary deed, by way of legacy.

Anſwered by *Mary Gainer*, That admitting ſuch to be the general principle of our law; yet, as Mr *Cuningham*'s teſtament, by the law of *England*, was available to convey the *St Chriſtopher's* eſtate, for the uſes and purpoſes therein expreſſed; and as *Daniel Cuningham* was, by the

ſaid

ſaid will, conſtituted reſiduary legatee of that eſtate, from whence he reaped conſiderable benefit, he was thereby barred from challenging, and even bound to concur in making effectual the bequeath, which, by the ſame will, was made of the *Scots* eſtate. So it has been decided in parallel caſes; 2d *December* 1674, *Cranſton contra Brown*; and 19th *July* 1745, *Paterſon contra Spreul.*

Further *objected* for *Daniel Cuningham*,

1*mo*, That the lands of *Holms of Dundonald* do not fall under the words of the legacy to *Mary Gainer* and her daughter. They could not be comprehended under the deſcription *my lands*; for the perſonal obligation contained in the minute of ſale, cannot be ſaid to have tranſferred the property of theſe lands from *Waterton* to *Robert Cuningham*, being only a ground of action to compel *Waterton* to implement. Neither could theſe lands be comprehended under the general words, *whatever I have or ſhall have, in Scotland, at the time of my deceaſe*; becauſe theſe words are ſubjoined to the enumeration of *bona mobilia*, ſuch as plate, furniture, *&c.* without any mention of debts or obligations; and it is not the practice to extend general words ſubjoined to particulars to other articles of a different ſpecies.

2*do*, Neither was it the teſtator's *intention*, that theſe lands ſhould be comprehended under the legacy: for *Robert Cuningham* repudiated, and even challenged, by ſuſpenſion and reduction, the minute of ſale; and to his death would have nothing to do with the lands, nor accept of a diſpoſition from *Waterton*. He was preparing to try every competent method for getting free of that contract, notwithſtanding the interlocutors of this court ſuſtaining it, when he happened to die. Hence it is plain, he could not mean to convey theſe lands under that legacy, when he never conſidered them as part of his eſtate: of which the other deed he granted in his lady's favour, upon the 17th *July* 1741, five weeks after the date of the minute, is further evidence; as every other bit of ground he had in *Scotland* is thereby ſpecially conveyed to her, but no mention made of the *Holms of Dundonald*.

And, 3*tio*, Suppoſing this legacy could comprehend theſe lands, yet it could only have the effect of conveying the contract of ſale, with its inherent burdens; and therefore, if *Mary Gainer* claimed the benefit of that contract, ſhe would be liable to pay the price, which was owing at *Robert Cuningham*'s death.

Anſwered for *Mary Gainer*: 1*mo*, The words, *all my lands*, comprehend every right to lands which *Robert Cuningham* had. In a deed *inter vivos*, the conveyance of all his lands, and whatever he had in *Scotland*, muſt have carried the perſonal obligation on *Waterton* to diſpone thoſe lands. And it can make no difference, in the preſent caſe, that the conveyance is in the form of a legacy. The general words are ſo broad, that they cannot be reaſonably circumſcribed to the *bona mobilia*. 2*do*, The teſtator's intention is ſufficiently plain from his words; and therefore it is incompetent to bring in extraneous circumſtances for explaining away the expreſs words of a deed. Moreover, before this teſtament was executed, the contract of ſale had been ſuſtained in this court by two interlocutors, unanimouſly pronounced; which could not be altered here; nor could Mr *Cuningham* have any good cauſe to expect an alteration on an appeal. Beſides, it muſt be preſumed to have been his intention, that if the contract could not be ſet aſide, the lega-

tee ſhould have the right of the lands. It does not appear, that Mr *Cuningham* intended to convey every eſtate he had in *Scotland* by the deed 1741, which contained only particular ſubjects; but as the *Holms of Dundonald* was the only ſubject in *Scotland* not thereby conveyed, the general legacy muſt have been intended purpoſely to carry it alſo. And, 3*tio*, Were this queſtion with *Waterton*, he indeed would not be obliged to diſpone till the price was paid; but as the teſtament appointed the whole of the teſtator's debts to be paid out of the *St Chriſtopher's* eſtate, and the price undoubtedly was a debt due by him at his death, it muſt be paid out of that eſtate. But this queſtion is only competent in the court of chancery, which has the ſole juriſdiction over the *St Chriſtopher's* eſtate.

"The Lords found, That the right which the deceaſed *Robert Cu-*
"*ningham* had to the lands of the *Holms of Dundonald* falls under
"the legacy left to the ſaid *Mary Gainer*, the teſtator's widow, in
"the teſtament made by him in favour of the ſaid *Daniel Cu-*
"*ningham* his ſon; and that therefore the ſaid *Daniel Cuningham*
"cannot quarrel the ſaid legacy; and preferred the ſaid *Mary*
"*Gainer* to the rents of the ſaid lands." D. R.

For Mr *Cuningham*, *A. Lockhart*, &c. Alt. *Dav. Dalrymple*, *Geo. Brown*, *Arch. Hamilton*.

N° LXXXIX. 17th *January* 1758.

WILLIAM URQUHART of MELDRUM,

AGAINST

JOHN CLUNES of NEILSTON, and others.

Upon the ſuppreſſion of a royal borough, the heritors of lands formerly held burgage within its territory, are intitled to hold of the crown.

THE village or town of *Cromarty* was anciently erected into a royal borough by charter from the crown; its privileges as ſuch continued for many years. The lands within its territory were held *more burgi*, and the proprietors infeft in them as uſual by the bailies of the borough.

In 1670, the magiſtrates and council of the borough, with conſent of ſome of the burgeſſes, diſponed to Sir *John Urquhart*, to whom they were indebted, the whole borough-lands and common good of the borough, ſaving all rights of property formerly made and granted by them, or their predeceſſors, to Sir *John* himſelf, or any other perſons; but without prejudice of Sir *John*'s immediate right of ſuperiority of the whole of the ſaid lands diſponed.

In 1672, the magiſtrates and council, with concurrence of certain burgeſſes and inhabitants, preſented a petition to the parliament of *Scotland*, ſetting forth their poverty and want of trade; praying to be relieved of the burden of ſending a commiſſioner to parliament; and granting procuratory for reſigning their privileges as a borough-royal, in the hands of his Majeſty, or his commiſſioners, the eſtates of parliament, lords

lords of exchequer, and convention of royal boroughs, to remain with his Majeſty *ad perpetuam remanentiam.* An act was accordingly paſſed in the ſame year, whereby the King, with conſent of the eſtates of parliament, accepted of this reſignation, and ordained the name of the borough to be expunged out of the rolls of parliament, and, " That " thereafter they ſhould have no commiſſioner to parliament, or con- " vention of boroughs, and be no more accounted a borough."

In 1681, another act of parliament was paſſed, exempting the town of *Cromarty* from the payment of ſupply; and in 1685, the convention of royal boroughs expunged the town from their rolls; and in 1686, all theſe acts were ratified by another act of parliament.

In 1685, *George* Viſcount of *Tarbat*, afterwards Earl of *Cromarty*, purchaſed Sir *John Urquhart*'s eſtate at a judicial ſale, including the ſubjects diſponed to him by the borough of *Cromarty* in 1670; upon which the Viſcount expede a charter in 1685, containing a *Novodamus* of the town and lands of *Cromarty*. In the ſame year 1685, that charter was ratified in parliament, and the Viſcount obtained another act of parliament, erecting the village and town of *Cromarty*, with the lands thereto belonging, into a borough of barony, with power to the Viſcount to appoint bailies, *&c.* and further, declaring the town to be the head borough of the ſhire, notwithſtanding its being deprived of its privileges as a royal borough.

From the Viſcount of *Tarbat*, the lands and ſubjects contained in the charter 1685, came by progreſs to Mr *Urquhart* of *Meldrum*; who brought a proceſs of improbation againſt *John Clunes*, and certain other proprietors of lands within the ancient royalty of *Cromarty*, in order to oblige them to acknowledge him as their ſuperior, and take charters from him. — The defenders had taken no inveſtitures from any ſuperior ſince the 1685; but they now maintained, that they were intitled to hold their lands of the crown.

Pleaded for *Meldrum*: 1*mo*, The royal borough of *Cromarty* being utterly extinguiſhed, every thing belonging to it, particularly the borough-lands, came to be in the ſame condition as if the charter of erection had been revoked, or never granted; that is to ſay, the ſame reverted to the crown, and were, by the charter 1685, veſted in the purſuer's author, who had already, in the 1670, purchaſed from the community of the borough all right they could give him. The former poſſeſſors of borough-lands might be ſatisfied with not being ejected, and cannot complain of the King's interpoſing a ſuperior between them and the crown on that occaſion; as the act 1690, in favour of the vaſſals of biſhops and chapters, does not extend to them.

2*do*, Where there is no borough, there can be no burgage holding; as by that holding the borough or corporation holds of the crown; and every burgeſs, as a member of that corporation, holds alſo of the crown upon the ſame condition of watching and warding. Now, this borough being diſſolved, the burgeſſes can hold the borough-lands no longer by that tenure; and the town being ſince erected into a borough of barony, in favour of the purſuer, the old borough-lands muſt neceſſarily hold of him, as baron of the borough.

Anſwered for the defenders: 1*mo*, During the ſubſiſtence of the royalty, the proprietors of borough-lands were the King's vaſſals, and only received infeftment from the bailies, as the King's commiſſioners,

ers, not as ſuperiors. It was even then competent for the vaſſals, to have taken infeftments directly from the chancery; of which there are examples on record; *Rol.* 4. *Robert.* II. N° 84.; and *Rol.* 9. *Robert.* II. N° 1. The council of the borough, and burgeſſes, might, with conſent of parliament, make an effectual reſignation or ſurrender of its privileges as a community; but they could not ſurrender the rights of the burgage-holders, who had no concern in the acts and charters founded on by the purſuer. The borough-lands, upon the ſuppreſſion of the borough, could only revert to the crown ſo far as the ſame were poſſeſſed and reſigned by the borough; conſequently the borough's property-lands, and the duties formerly paid to it, might thereafter be at the crown's diſpoſal; but the defenders predeceſſors having been *ab ante* veſted in the property of their lands, and the borough having had no ſuperiority over them, it could reſign or ſurrender no right to the one or the other; the defenders muſt have continued proprietors of their lands holding of the crown.

2*do*, Burgage holding is a ſpecies of ward holding, *Craig*, *lib.* 1. *dieg.* 10. § 31.; and as ward holding is now aboliſhed, the defenders are intitled to hold blanch of the crown, in terms of the late ſtatute. *Non agebatur*, by the erection of the town into a borough of barony, to affect the rights of the defenders, who were third parties not in the field, and that, as well as the other acts and charters referred to, were granted *ſalvo jure*. The grant of the ſuperiority of the borough of barony, as a community, could never import a grant of the ſuperiority of all the lands within the ancient royalty, in prejudice of the crown's vaſſals in ſuch lands.

And, 3*tio*, Neither Sir *John Urquhart*, nor any other of the purſuer's authors, ever before laid claim to the ſuperiority of the defenders lands; and therefore, if they had any right to it, it is now loſt *non utendo*.

Replied by the purſuer, The right to the ſuperiority could not be loſt *non utendo* ſince the 1685, ſeeing the defenders cannot ſay, that they have, during that time, taken charters from the crown, or any other ſuperior. No right of lands, whether property or ſuperiority, can be loſt by diſuſe of poſſeſſion, unleſs poſſeſſed by another, and acquired to him through preſcription.

" The Lords found, That the purſuer had no right either of pro-
" perty or ſuperiority to the defenders lands; but that the ſame
" formerly held burgage, and now hold of the crown; and there-
" fore aſſoilzied, and decerned." D. R.

Act. *Burnet, Ferguſon.* Alt. *Hamilton-Gordon.* Reporter, *Shewalton.*

N° XC.

N° XC. 20th *January* 1758.

JEAN WALLACE, and JOHN BUCHANAN writer in *Glaſgow*, her HUSBAND,

AGAINST

JANET WALLACE, and THOMAS BUCHANAN of *Kirkhouſe*, her HUSBAND.

A dwelling-houſe, &c. *built within a borough of barony diſcontiguous to the reſt of the heritor's landed eſtate, falls not to his eldeſt heir-portioner as a* præcipuum.

Alexander Wallace ſheriff-clerk of *Renfrew*, died poſſeſſed of moveables to the extent of *L.* 3000 *Sterling*, and heritage to the value of about *L.* 1000 *Sterling*. He left two daughters, *Jean* and *Janet Wallaces*; and as he made no ſettlement, his eſtate fell to be divided between them.

Alexander Wallace's heritable eſtate conſiſted of 70 acres of ground, yielding about 200 merks, ſituated at the diſtance of two or three miles from *Paiſley*; of a houſe and offices, which he built for his own reſidence, on half an acre of ground purchaſed by him at the weſt end of the town of *Paiſley*, and held feu of the borough; and of ſix or ſeven acres of land, lying near half a mile diſtant from his houſe, which he purchaſed, and incloſed, after building the houſe, and ſometime let to a tenant, but afterwards took into his own poſſeſſion.

Jean, the eldeſt daughter, brought a proceſs againſt her ſiſter *Janet*, for having the houſe, offices, and garden, at *Paiſley*, as the meſſuage or manſion-houſe of the defunct, declared to belong to her as a *præcipuum*, in reſpect of her primogeniture, without being liable to give a recompence to her ſiſter.

Pleaded for the purſuer, By the cuſtom of this country, female heirs ſucceed equally in lands, and heritable ſubjects that admit of diviſion; but ſuch ſubjects and rights as are indiviſible, devolve, according to the law of primogeniture, upon the eldeſt heir-portioner. In judging what ſubjects are diviſible or not, the nature of the ſubject, and not the value or eſtimation of it, is conſidered. The brief of diviſion only concerns ſuch ſubjects as of their own nature can admit of a partition, and does not apply to indiviſible ſubjects, or direct them to be valued or ſold, and the price divided. Nor does the law diſtinguiſh between manſion-houſes uſed by heritors of lands for their own proper reſidence, but built in the form of an ordinary dwelling-houſe, and ſuch houſes built like a tower or fortalice. Of whatever form the houſe is, it falls to the eldeſt heir-portioner, together with the offices and garden. So it was found, 26th *February* and 5th *March* 1707, and 24th *July* 1708, *Cowie contra Cowie*, and in the competition among the heirs-portioners of *James Peaddie* merchant in *Glaſgow*, in 1743, and no recompence was allowed. The houſe in queſtion was entirely poſ-

ſeſſed by the defunct, and built for the accommodation of his ſingle family; and therefore ought to belong to the purſuer.

Anſwered for the defender, By our ancient law, the eldeſt daughter was intitled to the meſſuage or principal manſion-houſe upon the eſtate of her father; but under this quality, *ita quod in aliis rebus ſatisfaciet aliis ſororibus ad valentiam*; *Reg. Maj. c.* 27. § 4. *c.* 28. *lib.* 2.; *Craig*, *lib.* 2. *dieg.* 14. § 7. It is true, that a few later deciſions have found the eldeſt daughter intitled to the meſſuage, without recompence; but the point cannot yet be held as ſo eſtabliſhed: and, at any rate, theſe deciſions will not be extended ſtill further, contrary to the common law of ſucceſſion among heirs-portioners, which diſtributes equally every ſubject, capable by its nature either of diviſion or of valuation. The brief of diviſion is an executorial of the law, which confers the ſucceſſion of the defunct's heritable eſtate upon his daughters *per capita*; and therefore muſt be underſtood to direct the ſheriff, and the aſſize called by him, not indeed to divide every field, farm, houſe, or mill, but to make the ſeveral allotments, according to the juſt value of the ſeveral ſubjects which compoſe the heritage. — Titles of honour and juriſdictions are incorporeal rights, which, from their own nature, and that of the grant of them, cannot be veſted in more than one perſon at the ſame time; and therefore fall to the eldeſt. A ſingle ſuperiority too goes the ſame way, in reſpect to the vaſſal's intereſt, which forbids a diviſion; but, then, being properly a right of lands, a recompence is due; and if there are more ſuperiorities, they are diſtributed among the ſiſters. Thus it is plain, that every indiviſible ſubject does not fall to the eldeſt without recompence. — But, at any rate, it is ſufficient to exclude this purſuer's claim to the houſe in queſtion, that it is not a manſion-houſe ſtanding on the defunct's land-eſtate, which lies at a conſiderable diſtance from it, but a houſe built within the town of *Paiſley*, contiguous on one ſide to other houſes in the town, and held feu of the borough: ſo it is merely an urban tenement, which was intended for the defunct's reſidence when attending his buſineſs as clerk to the ſheriff-courts held there. It therefore falls under the diviſion, according to the opinion of *Craig*, *Stair*, and other authors.

Replied for the purſuer, The houſe may be truly ſaid to be ſituated in the country, as there are none of the houſes of the borough that lie without it, or ſeparate it from the adjacent fields; and it cannot come under the deſcription of borough-houſes mentioned by Lord *Stair*, which are ordinarily ſet *per contignationes*, and built for the accommodation of ſeveral families. Moſt of the fields for two miles round hold of this borough of barony; but that could never hinder an heritor from building a proper manſion-houſe upon his own grounds: and although this houſe and garden are not contiguous to the other lands of the defunct, yet that circumſtance ought not to make any variation in the caſe, as a part of his lands were ſo near as to afford him the conveniency he wanted for keeping his horſes and cattle.

The court ſeemed to be of opinion, that this houſe was not properly a meſſuage or manſion-houſe, in reſpect of its ſituation.

" The Lords ſuſtained the defence, aſſoilzied the defender, and decerned." D. R.

Act. *Ferguſon.* Alt. *Miller.* Clerk, *Kirkpatrick.*

N° XCI.

N° XCI. 20th *January* 1758.

ALEXANDER LOCKHART of CRAIGHOUSE,

AGAINST

JOHN SEIVEWRIGHT of SOUTH-HOUSE.

Conterminous heritors are bound to repair and uphold march-dikes formerly built.

IN *March* 1745, *Alexander Lockhart* purchaſed the lands of *Craighouſe* from *John Seivewright*'s father. The boundary on the eaſt, between the lands of *Craighouſe* and the lands of *Plewlands*, the property of *Seivewright*, is deſcribed in the diſpoſition to be a ſtone dike, " which " ſtone dike, upon the eaſt ſide, is hereby declared to be, now, and in " all time coming, the boundary between the ſaid lands of *Plewlands* " and the lands of *Craighouſe*."

In the year 1757, this ſtone dike had become decayed; and Mr *Lockhart*, with a view to incloſe that part of his eſtate, brought an action againſt *Seivewright*, to oblige him to contribute half the expence of repairing or rebuilding it, or of making ſuch other ſufficient fence as ſhould be found to be proper.

Pleaded in defence, The dike in queſtion was not built by two conterminous heritors, in terms of the act 41. parl. 1661, but by the heritor of *Craighouſe*, for the advantage of that eſtate, when he was proprietor alſo of *Plewlands:* and the clauſe in the diſpoſition, declaring this dike the boundary, muſt be underſtood to transfer the property of it to the purchaſer of *Craighouſe:* That the defender will have no benefit from this dike; becauſe his eſtate of *Plewlands* is unincloſed, and is let out to tenants upon leaſes for a great number of years. The act of parliament 1661 makes no proviſion for upholding or repairing march-dikes after they are built: and though, at common law, thoſe who have concurred in building, may be obliged to uphold; yet this will not apply to the caſe, where one heritor has been at the ſole expence of building, without following the rules of the act 1661; the intention of which ſtatute was only to encourage the incloſing lands, but not to provide for preſerving incloſures already made.

Anſwered, It is of no conſequence, whether this dike was built by *Seivewright*, when proprietor of both eſtates, or at a time when the eſtates belonged to different proprietors; ſince by the diſpoſition to Mr *Lockhart*, it is declared to be the march-dike; and, of conſequence, is the common property of the purſuer and defender. The act 1661 makes no diſtinction, whether the heritor who is required to concur in building a march-dike, will or will not reap any advantage from it, by completing an incloſure upon his own eſtate; and after the dike is erected, it muſt follow, at common law, independent of the act 1661, that each heritor ſhall contribute equally to uphold and repair their common property.

" The

" The Lords found the defender liable to contribute one half of the " expence of upholding the march-dike between the purſuer's " property and his." W. J.

Act. *Garden.* Alt. *Scrymgeour.*

N° XCII. 31ſt *January* 1758.

ALEXANDER CUNNAND,

AGAINST

ADAM TURNBULL and JOHN KIRKALDIE, CREDITORS of JAMES CUNNAND.

Heritable bonds obtained from a perſon inſolvent by confident perſons, how far preferable?

James Cunnand was poſſeſſed of ſome heritable ſubjects in the town of *Inverkeithing*, in which his wife was infeft for her liferent. In the year 1750, he called his creditors together, and agreed to grant a truſt-diſpoſition to *Adam Turnbull* and *John Kirkaldie*, two of his creditors, to be diſpoſed of by them for the behoof of the other creditors; but he and his wife afterwards refuſed to grant this deed. The creditors proceeded to take ſeparate meaſures: and *John Kirkaldie* obtained an heritable bond for his debt; and *Adam Turnbull* ſoon after obtained heritable bonds for his debts; upon which each of them was infeft, preceding the 12th of *April* 1751. *Alexander Cunnand*, another creditor, ſome months thereafter, executed an inhibition, and alſo obtained an adjudication againſt *James Cunnand*, upon the 30th of *July* 1751.

In *Auguſt* 1752, *James Cunnand* ſold his heritable ſubjects; and the purchaſer having brought a multiple-poinding, it was *objected* by *Alexander Cunnand*, againſt *Turnbull* and *Kirkaldie*'s heritable bonds, That they could not be preferred to him, in reſpect that theſe bonds were granted in ſecurity of prior debts, and ſoon after a meeting of the common debtor's whole creditors, at which *Kirkaldie* and *Turnbull* were alſo preſent, where a truſt-diſpoſition was agreed to be granted, and the creditors to be paid proportionally; and that after this agreement, it was a fraud in *Kirkaldie* and *Turnbull* to take theſe heritable bonds.

Upon the 11th of *January* 1757, " the court found, That *John* " *Kirkaldie* and *Adam Turnbull* could have no preference in virtue of " the heritable bonds and infeftments produced for them."

A queſtion occurred, Whether, in terms of this interlocutor, theſe bonds were to be conſidered as abſolutely null, ſo as to give *Alexander Cunnand* a preference by his adjudication; or if *Kirkaldie* and *Turnbull* were intitled to be ranked *pari paſſu* with him?

Argued for *John Kirkaldie* and *Adam Turnbull*, That they were in this caſe guilty of no fraud, but were intitled to act for themſelves, after the common debtor refuſed to grant a truſt-diſpoſition: That in this caſe the common debtor was not a bankrupt in terms of the act 1696; and was therefore at full liberty to grant the heritable bonds: That tho' the

the court had refuſed to give them a preference upon their heritable bonds; yet the ſame equity ought to bring them in equally with the adjudger, agreeable to what was intended by the truſt-diſpoſition.

Anſwered, By the interlocutor of the court it was found, that the heritable bonds could give no preference; and it is a conſequence, that they cannot intitle the creditors to be preferred equally with the adjudger; and, independent of the interlocutor, it is equitable, that thoſe creditors who attempted to take an undue advantage, ſhould be caught in their own ſnare, and be deprived of every advantage from that ſecurity which they had unduly elicited. This is agreeable to the practice of the court in other caſes. A diſpoſition by a bankrupt being reduced on the act 1696, the court refuſed to give it the effect of bringing him in *pari paſſu* with the other creditors; 2d *December* 1704, *Maun*; 19th *July* 1728, *Smith*.

" The Lords found, That the heritable creditors are intitled to be " ranked *pari paſſu* with the adjudger." W. J.

Act. Geo. Wallace. *Alt. Johnſtone.*

N° XCIII. 4th *February* 1758.

SPOTTISWOODE of that ILK,

AGAINST

The CREDITORS of the deceaſed JAMES NASMITH of EARLSHAUGH.

Superiority of biſhops lands.

IN the ranking of the creditors of the ſaid *James Naſmith*, a queſtion occurred, Whether certain lands which had belonged to him in property, called *Howell*, *Balſier*, *&c.* held feu of the crown, or of Mr *Spottiſwoode* of that Ilk, who claimed the right of ſuperiority?

Sir *Robert Spottiſwoode*, Lord Preſident of the Seſſion, in 1624, was infeft, by a charter under the great ſeal, in the barony of *New Abbey*, containing the lands which had belonged to the abbacy of *New Abbey*.

In 1633, King *Charles* I. formed the deſign of purchaſing from Sir *Robert* the foreſaid lands of *New Abbey*, in order to mortify them for the uſe of the biſhoprick of *Edinburgh*: but it was thought proper, as they were church-lands, and conſequently had been annexed to the crown by the act 1587, firſt to get them diſſolved; and accordingly an act was obtained for that purpoſe in the year 1633, by which " the " abbacy of *New Abbey*, with the whole lands, baronies, kirks, teinds, " patronages, and others pertaining to the ſaid *Abbey*, as well tempo- " rality as ſpirituality of the ſame, and particularly with the right of " ſuperiority of the kirk-lands of *Dunrod*, *&c.* are diſſolved from " whatever acts of annexation were made in this preſent or any pre- " ceding parliament; and ſpecially from the act 1587, the 11th act, " parl. 10. and act 119. parl. 12. *James* VI. forbidding the erection " of kirk-lands and teinds into temporal lordſhips." And the above

act of diſſolution is expreſsly excepted from the act *ſalvo jure cujuſlibet* of that parliament.

After this diſſolution, Sir *Robert Spottiſwoode*, in purſuance of the King's deſign, diſponed to the King the foreſaid lands of *New Abbey* and others, for the agreed price of *L.* 3000 *Sterling*. But this price was not paid by his Majeſty to Sir *Robert*.

In the ſame or following year, his Majeſty, by a charter under the great ſeal, erected the biſhoprick of *Edinburgh*, and mortified the foreſaid lands and others, as a conſtant revenue of the new-erected ſee; and the biſhop of *Edinburgh* appears to have been in poſſeſſion of them in the year 1637.

By the 6th act of parliament 1640, Epiſcopacy was aboliſhed, and the revenues of the new-erected biſhoprick of *Edinburgh* reverted to his Majeſty; and as he had no further uſe for them, it was thought juſt that Sir *Robert* ſhould have back his lands again: and accordingly, in 1641, Sir *Robert* obtained a ſignature from his Majeſty, reciting the purchaſe of the lands from Sir *Robert*, and the mortification in favour of the biſhop of *Edinburgh*; the return of the ſame to the crown by the abolition of Epiſcopacy; and that the price had not been paid; and therefore giving back the lands to Sir *Robert*, as alſo the lands and barony of *Dunrod*, comprehending, among others, the lands in queſtion. But, by the confuſion of the times, and the misfortunes of Sir *Robert*, which ſoon after enſued, this grant was not carried into execution by charter and infeftment; nor was poſſeſſion attained by Sir *Robert*.

Upon the reſtoration of King *Charles* II. *Alexander*, eldeſt ſon and heir to Sir *Robert*, obtained a new ſignature, narrating and confirming the ſignature in the 1641, and directing a charter to be expede under the great ſeal in favour of *Alexander* and his heirs. And in conſequence of this grant *Alexander* entered into poſſeſſion.

By the firſt act of parliament 1662, Epiſcopacy was reſtored; and particularly the biſhops were reſtored to their rents and poſſeſſions, as they had ſtood in the year 1637. And *Alexander Spottiſwoode* having died ſoon thereafter, leaving his children infants, no further ſteps were taken till the year 1695, when Mr *John Spottiſwoode*, eldeſt ſon and heir to *Alexander*, applied to the parliament of *Scotland*, by petition, ſetting forth the fact as above ſtated, and praying relief. This petition was remitted to a committee; who, after hearing counſel in behalf of his Majeſty, and of the petitioner, made their report; and thereupon the parliament "found and declared, That the clauſe in the "act of parliament 1662, reſtoring biſhops to their eſtates and poſſeſ-"ſions, as by them enjoyed in the year 1637, *could not prejudge the pe-"titioner*; and that the price never having been paid, that the ſaid "lands and barony of *New Abbey*, and others, do appertain and be-"long to the ſaid *John Spottiſwoode*, or at leaſt the foreſaid price there-"of, with the annualrent ever ſince Sir *Robert* ceded and gave up his "poſſeſſion; and therefore they recommended, that a new ſignature "be paſſed in favour of the ſaid *John Spottiſwoode*, conform to the ſig-"nature formerly granted to his grandfather in the year 1641."

This recommendation however was ineffectual; and *Spottiſwoode* was at laſt obliged to bring a declarator of his right againſt the officers of ſtate; and having obtained a judgment and recommendation by the court

court of ſeſſion, he at laſt got a charter from the crown in terms of the ſignature 1641, whereupon he was infeft in 1742.

It was agreed betwixt the parties, that the above-mentioned parcels of lands were church-lands, belonging of old to the abbacy of *Holyrood-houſe*, and parts of the barony of *Dunrod*. And *Spottiſwoode* claimed the ſuperiority of them upon the ſignature 1641, which expreſsly gives him the barony of *Dunrod*.

Objected for the creditors, Theſe lands became biſhops lands by the foreſaid charter of erection of the biſhoprick of *Edinburgh* in 1633, and were poſſeſſed by the biſhop of *Edinburgh* till the year 1637; and again poſſeſſed by his ſucceſſors from the year 1662 down to the revolution; and therefore muſt be found to hold of the crown, as the other lands belonging to biſhops; and by the act 1690, the King cannot interpoſe an intermediate ſuperior betwixt himſelf and the vaſſals that held of the biſhops, which theſe lands formerly did, having been feued out by the biſhops while in poſſeſſion.

Anſwered for *Spottiſwoode*, The act 1690 refers only to the ſuperiorities which *de jure* belonged to the biſhops at the abolition of that order, and not to ſuperiorities which did never truly belong to them nor to the King, their author, although they uſurped the poſſeſſion for ſome time. After the repeated declarations in the ſignatures, and acts of parliament above mentioned, that the lands belonged to *Spottiſwoode* and his predeceſſors, in regard the ſale made by them to the crown never took effect, and that their right was not prejudged by the laws made in favour of biſhops; it can never be maintained, that they were included under the general clauſe in the act 1690, which applies only to the ſuperiorities that of right pertained to the biſhops, while that order ſubſiſted, and devolved to the crown upon its abolition: and although the legiſlature thought fit, for good reaſons, to forbid the interpoſition of a new ſuperior above the vaſſals who formerly held of theſe dignified clergy, that cannot apply to the preſent caſe, where the King is interpoſing no new ſuperior, but reſtoring the lands to the former proprietor, who was never juſtly diveſted of them, as the contract of ſale with the crown was never completed. And therefore theſe lands do now belong to him, in the ſame manner as they did to his predeceſſor Sir *Robert Spottiſwoode*; and it ought to be found that he is the true ſuperior.

" The Lords found, That the ſuperiority of the lands in queſtion " not having belonged originally to *Spottiſwoode*, but being granted by the crown to the biſhop of *Edinburgh*, fall under the prohibition of the act 1690; and that *Spottiſwoode* could not be interpoſed as ſuperior between the King and Mr *Naſmith* the vaſſal." G. C.

Act. *Dav. Dalrymple, Ferguſon.* Alt. *Burnett.*

N° XCIV.

N° XCIV. 8th *February* 1758.

Hearing in preſence.

CREDITORS of JAMES HEPBURN of HUMBY,

AGAINST

His CHILDREN.

Entail wanting reſolutive clauſe, not effectual againſt creditors.— If entail executed prior to the 1685 *muſt be recorded?*

ANno 1663, *Adam Hepburn* executed an entail of the eſtate of *Humby*, whereby, *inter alia*, it was declared, "That it ſhall neither be lawful, nor in the power of me, the ſaid *Adam Hepburn*, nor any of the three perſons, or heirs of tailzie above mentioned, nor to mine or their heirs-male ſucceeding to the foreſaid living and eſtate, conform to the tailzie above ſpecified, to violate, break, or diſſolve the foreſaid tailzie, neither yet to annailzie, diſpone, wadſet, or burden the ſaid lands and eſtate, or any part thereof, or to do any deed whereby the ſamen may be compriſed, or any ways evicted frae them. —All whilks deeds ſhall be, and hereby are declared to be, void and null *ipſo facto*, and to be no ways valid, nor effectual, either to burden, affect, or evict the foreſaid lands, living, and eſtate, or any part thereof, or rents and duties of the ſamen, except ſuch of the ſamen deeds as ſhall be made and granted by the advice and conſent of the friends above ſpecified, had and obtained in writ."

But this entail was underſtood not to contain a reſolutive clauſe, voiding the right of the contravening heir of entail, who ſhould contract debt, or tranſgreſs the other prohibitions of the entail.

James Hepburn poſſeſſing the eſtate of *Humby* under this entail, contracted great debts; whereupon the creditors adjudged the eſtate of *Humby*, and purſued a ſale of it.

In this proceſs of ſale, the children of *James Hepburn* of *Humby* appeared for their intereſt, and maintained, that in virtue of the entail 1663, the eſtate could not be evicted by creditors.

The creditors made ſeveral objections to the validity of the entail; but waving theſe, the Lords ordered a hearing in preſence on this abſtract point, Whether an entail containing an irritant clauſe, that is, a clauſe voiding the debts contracted, but not containing a reſolutive clauſe, that is, a clauſe voiding the right of the heir contracting the debts, was ſafe againſt creditors?

Pleaded for the creditors, A power of aliening and charging an eſtate with debt, is conſidered by the law of *Scotland* as inherent in property; and there is no method of diveſting the owner of this power, but by adding to the prohibition to alien, or charge, a reſolutive clauſe, voiding or forfeiting the right of the owner *immediately* upon his contravening the prohibition: A prohibition without this reſolutive clauſe, is no more than an injunction, or command, from the maker of the entail; which cannot either take from his heirs the power of aliening, and charging

charging with debt inherent in his right of property, or from the creditors the remedy which the law gives them for ſatisfaction of their debt, by attaching every right in the perſon of their debtor. By force of this reſolutive clauſe, and the ſubſequent decree of declarator, the right of the contravener being forfeited from the time of the contravention, the eſtate cannot be affected by his creditors; but the next heir takes it, paſſing over the contravener, and making his title as heir to the immediate predeceſſor, whereby he is freed of the debts or deeds of the intermediate heir, who contravened. The entail in queſtion contains no reſolutive clauſe, expreſsly annulling the right immediately on contravention; and therefore the eſtate may certainly be attached, and ſold for payment of *James Hepburn*'s debts.

The act of parliament 1685, which gives effect to entails, and has declared the mode of entailing, expreſsly requires a reſolutive clauſe, voiding the right of the heir, immediately on his contravening the proviſions of the entail. It is declared, that, unleſs this reſolutive clauſe is inſerted in the procuratories of reſignation, charters, precepts and inſtruments of ſeiſin, the entail ſhall not be allowed to be effectual againſt creditors; and the neceſſity of this clauſe, to render an entail effectual againſt creditors, has been ſo much eſtabliſhed by authorities of great weight, and ſo much acknowledged in practice, that of 437 entails, executed and recorded from the year 1685 to 1755, it is omitted in very few of them.

Anſwered for the children of *Humby*, A power of aliening, and charging with debt, is by no means an inherent conſequence of property. The diſtinction betwixt a qualified and a ſimple fee, at one time or other received in almoſt every nation in the world, ſhows the poſſibility of holding an eſtate, which yet the holder cannot throw away. In other nations there are bars to alienation; but in hardly any nation except our own is this bar made effectual by a clauſe irritating the right of the contravener; which clauſes are but of late invention in the law of *Scotland*, and were introduced by the exceſſive anxiety of men to guard their entails, not only by prohibiting alienation, and voiding the deed, but even by voiding the right of the heir who alienates; but though ſuch are wanting, the entail will be good.

The act 1685 only declares it *lawful for the lieges to tailzie their eſtates, with ſuch proviſions and conditions as they ſhall think fit, and to affect ſaid tailzies with irritant and reſolutive clauſes.* It leaves it open to the lieges to affect their eſtates with ſuch of theſe clauſes as they think fit; but does not impoſe upon them the neceſſity of impoſing both clauſes. A clauſe voiding the debt, and a clauſe voiding the right of the perſon who contracts it, are quite ſeparate and diſtinct from each other, and have ſeparate effects; the one to annul the debt, the other to puniſh the contractor of it. Accordingly, if there is no clauſe voiding the debt, but a clauſe voiding the right of the perſon who contracts it, the entail will be open to creditors on the one hand, and the heir forfeited on the other; and, in the ſame manner, where there is a clauſe voiding the debt, and no clauſe voiding the right of the perſon who contracts it, full effect ought to be given to the clauſe that protects the entail itſelf, although there be no clauſe to forfeit the heir who attempts to hurt it. —It is impoſſible to ſuppoſe the act of 1685 ſo unjuſt to creditors, or ſo inhuman to poſterity, as to require neceſſarily of entailers to for-

feit their heirs immediately upon contravention; the effect of which would be, to puniſh the heir beyond bounds, and, beſides, to ſtrip his creditors of the benefit of his liferent, which they would otherwiſe have had. — The act of 1690, *cap.* 33. paſt ſoon after the revolution, and intitled, " Act for the ſecurity of the creditors, vaſſals, and heirs of " entail of perſons forfeited," omits the reſolving clauſe, as no ways eſſential to the purpoſe of the act, which was the ſecurity of entails. The words of that act are, " That no heirs of entails, *&c.* in infeft- " ments, or other deeds, affected with *prohibitive or irritant* clauſes, in " caſe of contravention of the proviſions therein mentioned, ſhall be " prejudged by the forfeiture of his predeceſſor, but only in ſo far as " the party forfeited had liberty to contract debt, or affect the lands, or " others, by the quality of the right and infeftment."

" The Lords found, in reſpect the tailzie contains no reſolutive clauſe, " forfeiting the right of the heirs of tailzie who ſhould contra- " vene the prohibitions and conditions thereof, that therefore the " ſaid tailzie cannot be effectual againſt the onerous deeds and " debts of the heirs of tailzie in poſſeſſion, nor bar the creditors " from proceeding in the preſent action of ſale."

To this entail it was further *objected* by the creditors, That though it contained a prohibition to annailzie, diſpone, wadſet, or burden the eſtate, it contained no prohibition to ſell; and therefore might be ſold; as entails admit of no latitude of interpretation to ſupport them.

" The Lords found, That theſe prohibitions imported a prohibition " to ſell the tailzied eſtate."

It was further *objected*, That though this entail was executed and completed by infeftment before the act 1685; yet there was a neceſſity for recording it afterwards in the regiſter of tailzies appointed by that act.

" The Lords found, That as the tailzie was executed and comple- " ted by infeftment before the act 1685, there was no neceſſity " for recording it in the regiſter of tailzies appointed by that " act." J. D.

Act. W. Steuart, And. Pringle, Advocatus, Ferguſon. Alt. *Cockburn, J. Dalrymple, Lockhart.*

N. B. The argument on this laſt head having been afterwards the ſubject of a hearing in preſence, in the caſe of the creditors of the Earl of *Rothes* againſt the Earl, will be ſeen in the collection of that caſe, on the 14th day of *December* 1758.

N° XCV.

N° XCV. 8th *February* 1758.

KATHARINE Ducheſs-dowager of GORDON, and Duke of GORDON,

AGAINST

JOHN GORDON.

General allegations of circumvention inſiſted on for reducing a tack.

*K*atharine Ducheſs-dowager of *Gordon*, in virtue of a right of locality provided to her by the late Duke, over the lands of *Auchanachy*, and the Duke of *Gordon*, in virtue of his title of the fee of the ſaid lands, brought a reduction of a tack of theſe lands ſet by the late Duke to *John Gordon*, a gentleman who had been very much about his perſon.

Their reaſons of reduction were, That the tack had been ſet by the Duke, who had been educated abroad, immediately upon his coming of age, and returning to his own country, at a time when he could know nothing of the value of his farms: That it was ſet not at half value: That it was ſet for thrice the term of years at which the Duke ſet his other farms, and extended over a great tract of country, containing many farms under it: That it was executed without the concurrence of the Duke's commiſſioners, who concurred in every other tack which he ſet; and that *John Gordon* had impoſed upon the Duke by the influence which his nearneſs to his perſon gave him over the Duke, and by fraud and circumvention in the tranſaction: and they craved a proof at large of all facts and circumſtances tending to ſupport their reaſons of reduction.

John Gordon produced ſeveral letters from the Duke; from which it appeared, that his Grace and he had taken three years to finiſh the tranſaction together.

In theſe circumſtances *pleaded* for the defender, The tack was ſet by the Duke, when *arbiter rei ſuæ*, and after three years conſideration: That, allowing the leſion to have been ever ſo great, this of itſelf was not enough to reduce the tack, without the addition of fraud and circumvention: That the particular circumſtances alledged might indeed ſhow leſion; but the allegation of fraud and circumvention ſubjoined to them was too general; and therefore the purſuers muſt condeſcend more particularly upon the circumſtances of fraud and circumvention before a proof can be allowed them.

Pleaded for the purſuers, It has hitherto been underſtood to be a rule, That, in an action for ſetting aſide an agreement, on account of deceit or impoſition uſed in ſome circumſtances relating to it, the party injured is intitled to demand a proof upon a general allegation of fraud, without giving a circumſtantial detail of the particulars. It is the intereſt of the public, as well as of the party injured, that, in every caſe, fraud ſhould be detected; which can only be done by allowing

ing a proof of all the circumſtances attending the tranſaction. Before this proof is taken, every minute circumſtance cannot be known; or, if known, ought not to be diſcovered; as the ſame art and addreſs which brought about the agreement, might be employed to prevent a detection of the fraud.

" The Lords refuſed a proof at large, and aſſoilzied the defend-
" er." J. D.

Act. *A. Pringle, Advocatus.* Alt. *Lockhart.*

N° XCVI. 10th *February* 1758.

WILLIAM YULE,

AGAINST

ROBERT RITCHIE.

In a reduction of a diſpoſition by an apparent heir not three years in poſſeſſion, the poſſeſſion of the diſponee for three years was found equivalent.

Margaret Miller, while ſhe was apparent heir, and before ſhe had been three years in poſſeſſion, diſponed a tenement of land to *Ritchie*.

Richie entered to poſſeſſion, and continued in it more than three years.

Yule, the heir of *Margaret Miller*, brought a reduction of this diſpoſition, as granted by an apparent heir not three years in poſſeſſion.

Ritchie's *defence* was, That his poſſeſſion muſt be deemed the poſſeſſion of *Margaret Miller*, the diſponer, ſo as to make her, in the eye of law, to have been three years in poſſeſſion.

Anſwered for *Yule*, The conſtruction contended for by the defender, is contrary to the reaſon of introducing the exception from the Common law. The exception was introduced merely in reſpect of the *bona fides* of thoſe who had been tempted to contract with a perſon whom they ſaw three years in poſſeſſion; and whom they therefore had reaſon to think was duly veſted in the ſubject: but this will never apply to a perſon contracting with one not three years in poſſeſſion, even though the contractor himſelf ſhould remain twenty years in poſſeſſion after that. His after poſſeſſion will not give him that *bona fides* which he had not at firſt; and the rule of law takes place, *Quod initio vitioſum, tractu temporis convaleſcere non poteſt.*

In the next place, as the exception in queſtion was introduced in the face of the Common law, which allows no perſon not infeft to diſpone, courts cannot, in a ſtatute correctory of the Common law, go beyond the letter of the ſtatute. The ſtatute requires a three years poſſeſſion by the apparent heir; and a court cannot, in place thereof, ſubſtitute a three years poſſeſſion by the diſponee.

" The Lords aſſoilzied from the reduction." J. D.

Act *J. Dalrymple.* Alt. *Dav. Rae.*

N° XCVII.

N° XCVII. 14th *February* 1758.

MARION PATERSON,

AGAINST

JAMES COCHRAN of KIRKWOOD.

Aliment of a baſtard child, if it falls under the triennial preſcription of the act 1579?

Marion Paterſon, in 1755, brought an action againſt Mr *Cochran*, for aliment of a baſtard-child which ſhe had brought forth to him in the year 1730.

The defender acknowledged his guilt with the purſuer; and that about twenty years ago he had made ſeveral payments, amounting to about *L.* 100 *Scots*, to her on that account, which he thought was in full of all ſhe could aſk; and *inſiſted*, That as ſhe had never made any demand on him ſince that time, her claim was now preſcribed by the act 83. parl. 1579; by which it is declared, "That all actions of debt for "houſe-mails, mens ordinaries, *&c.* and other the like debts, that are "not founded upon written obligations, be purſued within three years; "otherwiſe the creditor ſhall have no action, except he either prove "by writ, or by oath of his party."

Anſwered for the purſuer, The father is under a natural obligation to furniſh aliment to his child, which obligation cannot preſcribe; and it is abſurd to ſay, that when another performs this obligation for the father, his claim for relief ſhould be cut off by the triennial preſcription. 2*do*, Suppoſing the claim was to be referred to the defender's oath, all that he could depoſe upon would be how much he had truly paid, that the ſame might be deducted from the purſuer's claim.

Obſerved on the bench, The act 1579 proceeds upon a preſumption, that debts of the kind there mentioned are paid, either at the time, or before the three years expired. But here the defender does not ſay, that he paid a reaſonable aliment. All he gave, by his own account, was, about *L.* 100 *Scots*; therefore he ought now to pay the remainder, which, in the caſe of a gentleman, ought to be maintenance of the child till it is fourteen years of age.

"The Lords repelled the defence founded on the act 1579, and found "the defender liable in *L.* 40 *Scots* yearly for maintenance of "the child till fourteen years of age; and in expences of pro-"ceſs." G. C.

Act. *Swinton*. Alt. *Macqueen*.

N° XCVIII. 14th *February* 1758.

MARION and JEAN DUNCANS,

AGAINST

JOHN BUCKNEY.

Regular proceſs neceſſary for making tranſumpts.

IN a competition betwixt theſe parties, ariſing in a proceſs of mails and duties of ſome tenements and lands lying in and about the town of *Linlithgow*, there were produced for *John Buckney*, copies, or pretended tranſumpts of the whole title-deeds under which he claimed right to the ſubjects in queſtion. The deeds themſelves were ſaid to be loſt.

It was *objected* to theſe tranſumpts, That they were no more than copies of the principal deeds, certified by an extract under the ſubſcription of one *Thomas Leſlie*, deſigned clerk-depute of the ſheriff-court of *Linlithgow*, and who appears to have been only a clerk or ſervant of Mr *Buckney*'s, who was himſelf principal clerk of that ſhire. Theſe extracts are all certified and dated at the ſame time, *viz.* 30th *December* 1726, and appear to have been done ſingly on the application of Mr *Buckney*, without any proper or regular proceſs, calling *ſpecially* the parties intereſted in thoſe writings which were to be tranſumed, and all others having or pretending intereſt *edictally* to hear and ſee the tranſumpts properly made, which is the courſe required by law; *Stair*, *lib.* 4. *tit.* 31. § 3.: That the whole affair ſeems to have been ſlurred over as a matter of mere form, which was ordered *de plano*; and that too in an inferior court, where it is doubted whether even a proceſs would have been competent, ſeeing the tranſuming of writs is not an act *ordinariæ juriſdictionis*: and as no cauſe is aſſigned for ſo extraordinary a ſtep, as a perſon's tranſuming at once the whole title-deeds in his poſſeſſion, a very juſt ground of ſuſpicion does thence ariſe, that it muſt have been done with a view to cover ſome defects in the deeds themſelves.

Anſwered, There is nothing in that part of the objection, That the tranſumpts were made in a court where Mr *Buckney* was clerk, and acted by a depute; becauſe the faith of a tranſumpt ſeems to depend upon this, that the principal writings are conſidered and compared by the judge. No author has ſaid, that tranſumpts may not be taken before an inferior judge; and it is believed the contrary has been the general practice. Neither is it a good objection, That there was no proceſs in this caſe; which is only neceſſary where the writs to be tranſumed are in the hands of another perſon; and there could properly be no proceſs, as Mr *Buckney* was tranſuming papers belonging to himſelf, and in his own hands. Neither could he have called the repreſentatives of the granters of theſe writings, as they were *Engliſh* people, quite unknown, having no *forum* in this country. Nor can it be juſtly ſaid, that theſe tranſumpts were made with any unfair deſign, as it was done at a time when the

principal

principal writings were produced in a former proceſs, where the validity of them was to be examined.

" The Lords found the tranſumpts were not ſufficient." G. C.

Act. *Lockhart.* Alt. *James Dundas.*

N° XCIX. 14th *February* 1758.

JAMES MACNEILL,

AGAINST

MARGARET LIVINGSTON.

Additional liferent-proviſion to a wife, if rational? If excluded by a diſpoſition to the husband, his heirs, and aſſignees, with a prohibition to contract debt? Deeds inter conjunctos, *if they prove their narratives?*

James Burns proprietor of the eſtate of *Clarkſton*, in the year 1699, granted a diſpoſition of that eſtate to his ſon *Richard Burns, his heirs and aſſignees, heritably and irredeemably*, &c. reſerving his own liferent, a power to burden with 4000 merks, and containing this expreſs proviſion and condition, " That *Richard* the diſponee ſhall have " no power, during the life of his father, to contract and ontake debts " upon the lands of *Clarkſton*."

Of the ſame date with this diſpoſition, *Richard Burns*, with conſent of his father, entered into a contract of marriage with *Margaret Livingſton* the defender; whereby, for 1000 merks of tocher advanced by her, *James* the father obliged himſelf to pay to *Richard* and her a certain annuity during his life; and both father and ſon bound themſelves, to infeft her, in caſe ſhe ſurvived her huſband, in a liferent of one half of the lands of *Clarkſton*; upon which ſhe was accordingly infeft: but no infeftment followed in the perſon of *Richard* upon the diſpoſition.

Notwithſtanding the proviſion above mentioned, *Richard Burns* contracted ſundry debts, upon which many diligences iſſued againſt him.

In 1718, *Alexander Livingſton* of *Parkhall*, the defender's father, granted a bond to her for the ſum of 4000 merks, with a proviſion, that it ſhould not fall under her huſband's *jus mariti*.

With this fund, the defender employed truſtees to purchaſe in moſt of her huſband's debts; who accordingly took aſſignations thereto for her behoof, in the years 1720 and 1721; and the narratives of theſe conveyances bear, that they had been purchaſed with her money.

In *April* 1721, *Richard Burns*, who appears to have been a facile man, and having no hopes of iſſue, granted an obligation to his three brothers, which proceeds upon the narrative, " That *James* his father " had diſponed to him the eſtate of *Clarkſton*, and that it was commu- " ned upon, that he ſhould grant the following obligation; therefore " he binds and obliges him, that in caſe he ſhould happen to have no " heirs of his own body, then he ſhould not make nor grant any vo-

" luntary

" luntary fraudulent right or alienation of the lands of *Clarkſton* in fa-
" vour of any perſon whatever, in defraud and prejudice of his ſaid
" brothers, anent their right of ſucceſſion to the ſaid lands."

In 1731, *Richard Burns* executed a deed in favour of his wife, the defender, proceeding on this narrative, " That ſhe had been a moſt " dutiful and affectionate wife, and had ſympathiſed with him in ma-" ny ſtraits and difficulties, and had advanced to different creditors of " his the ſum of 2500 merks, out of the ſums left her by her father; " therefore he obliges him, and his heirs, to repay the ſame; and fur-" ther obliges himſelf, to infeft her in liferent of the remaining half of " the lands of *Clarkſton*, to take place after the death of his father and " mother." This deed alſo contains a diſpoſition in her favour to his whole moveables.

In 1733, *Richard Burns* died without iſſue, his father and mother being ſtill alive. Upon their deceaſe, *Margaret Livingſton*, in virtue of her contract of marriage, and the deed 1731, entered into poſſeſſion of the liferent of the lands of *Clarkſton*.

In 1751, theſe deeds by *Richard Burns*, in favour of *Margaret Livingſton*, were brought under challenge, at the inſtance of the heirs of *Richard Burns*; and, 1*mo*, it was *objected* to the additional jointure of the half of the lands of *Clarkſton*, That it was gratuitous and unreaſonable, and contrary to the expreſs proviſo in the deed 1699, by which *Richard Burns* was barred from contracting debts upon the lands of *Clarkſton* during his father's life, and alſo contrary to the obligation above recited, which *Richard* had come under to his brothers in 1721; and therefore, as a voluntary gratuitous deed, muſt be held fraudulent, and be reduced, as counteracting the engagements which *Richard* had come under to his father and brothers.

Anſwered for the defender, By the deed 1699, the lands are conveyed to *Richard Burns*, *and his heirs and aſſignees*, *irredeemably*, &c.; there is no return to the father's heirs, nor any ſeries of heirs whatever, pointed out, in favour of whom he ſhould be limited: and therefore the import of ſuch diſpoſition is, that he had the full property of the lands, and could diſpoſe of the eſtate at pleaſure; and of conſequence could contract debt, or grant a reaſonable liferent to his wife for her ſubſiſtence; which in this caſe is very moderate, the eſtate in all being only *L.* 23 *Sterling* yearly. And, 2*do*, It is not competent to the purſuers, who claim as heirs of line to *Richard*, to challenge any of his deeds, ſeeing they repreſent him, and are liable to fulfill them. 3*tio*, The obligation in favour of the brothers can have no effect, as it excludes only voluntary fraudulent alienations, in defraud of their right of ſucceſſion, which this liferent-proviſion, allowing the property to deſcend to them, can never be reckoned.

2*dly*, It was *objected*, That the debts purchaſed by the defender's truſtees could not be kept up as a burden againſt the eſtate, as their onerоſity is not proved; that is, they are not ſhown to have been purchaſed by the wife's money, and muſt be preſumed to have been acquired by the huſband's means and eſtate. The narratives of deeds *inter conjunctos* bearing onerous cauſes, are not held probative; the original creditors in theſe debts, when making the conveyances, as they had no intereſt in the matter, would not be attentive or ſolicitous about what was put into the narrative. And no acknowledgment of the

the huſband in theſe deeds will defeat the preſumption of law, that the wife was poſſeſſed of no funds ſeparate from the huſband's, with which to make theſe purchaſes; eſpecially as it can be proved, that the 4000 merks left her by her father, excluſive of the *jus mariti*, was laid out for other purpoſes.

Anſwered, As the fact is eſtabliſhed, that ſeparate funds were left to the defender by her father, the preſumption lies on her ſide, when ſupported by the narrative of the deeds, in which it is inconceivable, that ſo many different people ſhould have joined in a falſehood.

3*dly*, It was *objected* to the obligation granted for 2500 merks to the defender, in conſideration of the other debts which ſhe had paid for her huſband, That there is no evidence what theſe debts were, or indeed that any ſuch ever exiſted, other than the narrative of the obligation itſelf, which can never be held as evidence.

Anſwered, The documents of theſe tranſactions were all deſtroyed many years ago in the houſe of one of the truſtees, which was burnt; but it is clear, from the whole circumſtances of the caſe, and particularly from the number of diligences produced againſt *Richard Burns* for very trifling ſums, that he had a number of debts, and was greatly ſtraitned. On the other hand, it is alſo clear, that the defender was poſſeſſed of ſeparate funds; and therefore the natural preſumption is, that theſe debts were cleared by her; and the purſuers ought not to be allowed to avail themſelves of having delayed their challenge ſo long till the proper evidence is loſt.

" The Lords found, That *Margaret Livingſton* had right to the life-
" rent of the whole lands of *Clarkſton*; and to the bond of 2500
" merks granted by *Richard Burns* to her, and the other debts
" conveyed to her truſtees by the creditors, in as far *only* as the
" 4000 merks in the bond of proviſion by her father to her, ex-
" cluding the *jus mariti* of her huſband, and annualrents thereof,
" were ſufficient to acquire the ſame, and no more; unleſs ſhe
" would ſhow, that ſhe had other funds, excluſive alſo of the *jus*
" *mariti*. But in reſpect that *John Burn*, the brother and appa-
" rent heir of *Richard*, in the conveyance of his debt, acknow-
" ledges there was a ſeparate fund from the 4000 merks, ſuſtain-
" ed the whole debt ſo conveyed by him." G. C.

Act. *Wal. Steuart.* Alt. *Ferguſon.*

N° C. 14th *February* 1758.

KATHARINE and RACHEL ERSKINES,

AGAINST

Mrs MARY BALFOUR-HAY.

Firſt member of entail being diſponee, *not bound by the reſtrictions laid on* heirs of tailzie.

IN 1677, *Michael Balfour* of *Randaſtoun* executed a ſettlement of his eſtate by way of entail, in favour of *James Balfour*, ſecond lawful

ſon to Sir *David Balfour* of *Forret*, one of the ſenators of the college of juſtice, and the heirs whatſoever of his body, without diviſion; whom failing, to the other heirs therein named.

This entail contains the ſtricteſt prohibitions *de non contrahendo et non alienando*, which are fenced with the uſual irritant and reſolutive clauſes; and by virtue of this ſettlement, the ſaid *James Balfour* ſucceeded to, and injoyed the ſaid eſtate, and after him, his ſons, *Michael* and *Robert*, and next his daughter, the defender.

In 1756, the purſuers brought an action againſt the defender for payment of a bond for 1000 merks granted to their father in *November* 1717, by the ſaid *James Balfour*.

The *defence* was, That ſhe was only an heir of entail, under ſtrict prohibitive, irritant, and reſolutive clauſes; and therefore not liable for any of her predeceſſors debts, who had no power to charge the entailed eſtate therewith.

The diſpoſitive clauſe in the tailzie runs thus: "Me, *Michael Balfour* "of *Randaſton*, for certain onerous cauſes, *&c.* to have given, grant- "ed, and diſponed, *&c.* from me, my heirs, and all others my ſuc- "ceſſors, *&c.* to and in favour of the ſaid *James Balfour*, and the "heirs whatſoever of his body, *&c.*; which failing," and ſo forth, ſubſtituting ſeveral other perſons, and their heirs-male allenarly, "under "the proviſions, conditions, reſervations, and reſtrictions under writ- "ten, conceived in favour *of the heirs of tailzie above named*, or in fa- "vour of me, and *Mary Hay* my ſpouſe, in manner after mentioned "allenarly."

In the obligement to infeft, the tailzier "binds and obliges himſelf, "his heirs and ſucceſſors, duly, well, and ſufficiently, to infeft and ſeiſe "*the ſaid James Balfour, and remanent perſons above named, heirs of* "*tailzie and proviſion*, &c." And the procuratory of reſignation is exactly in the ſame terms with the diſpoſitive clauſe.

The obligation to carry the arms is upon *the heirs of tailzie who ſhall any manner of way ſucceed to the eſtate*; and the prohibition to alter, *&c.* is in theſe words: "And further, it is hereby ſpecially provided, "and declared, That it ſhall not be lawful for *the ſaid heirs of tailzie* "*and proviſion*, in any caſe, to alter, innovate, *&c.* or to contract "debt," *&c.*

The clauſe containing reſerved powers to the tailzier is in theſe terms: "That it ſhould be lawful to the maker of the tailzie, without the "conſent of the *foreſaid perſons, heirs of tailzie and proviſion above* "*named*, or any of them, and their foreſaids, to ſell," *&c.* and the obligation to pay the tailzier's debts is in the ſame terms, being laid upon "*the above-named perſons, heirs of tailzie and proviſion, ſucceeding to me* "*in the ſaid lands*," &c. And the ſame clauſe further provides, That an extract of the tailzie ſhould be a ſufficient title to the maker's other heirs for purſuing *the foreſaid perſons, heirs of tailzie and proviſion above named, and their foreſaids*, for relief of theſe debts.

And in the clauſe diſpenſing with the not delivery, it is declared, "That the tailzie found unaltered at the maker's death, with all that "followed thereon, ſhould be obligatory evidents in favour *of the above-* "*named heirs of tailzie, although not delivered to the ſaid James Balfour,* "*as firſt perſon of the ſaid tailzie, or to any others of the ſaid heirs of* "*tailzie above named.*"

From

From the above-recited terms of the different clauſes in the tailzie, the purſuer *contended*, That *James Balfour*, the debtor in the bond purſued on, and inſtitute of this tailzie, was a ſimple diſponee; and therefore not bound by the ſame limitations and reſtrictions with the heirs of tailzie.

And in ſupport of this, *pleaded*, 1*mo*, That where one diſpones his eſtate directly in favour of a perſon *nominatim*, and the heirs of his body, whom failing, to certain ſubſtitutes, reſerving a liferent and powers to himſelf; in that caſe, none of the ſubſtitutes can take up the ſucceſſion as heir to the diſponer, but muſt of neceſſity ſucceed to the diſponee; and the reſtrictions impoſed upon the heirs of tailzie will not affect the diſponee, who does not take as heir, but as ſingular ſucceſſor to the granter. And there are no two things better diſtinguiſhed in the law of *Scotland*, than a diſponee, and an heir-ſubſtitute. The firſt of theſe takes an immediate fee, by expeding infeftment upon the procuratory contained in the diſpoſition, and it is impoſſible he can ſucceed as heir to the tailzier in this ſame ſubject: whereas, on the other hand, the ſubſtitute has but a hope of ſucceſſion, and, ſo ſoon as the ſucceſſion opens, muſt take it by a ſervice. And ſo this point was expreſsly decided in 1752, in the caſe of the entail made by *Leſly* of *Findraſſie*.

2*do*, Suppoſing it appeared evident from the clauſes of the entail, that the maker had truly not conſidered *James Balfour*, the inſtitute, as a ſimple diſponee, but had intended to comprehend him under the deſcription of *his heirs of tailzie*; and, as ſuch, had intended or ſuppoſed that he would be liable to the ſame limitations with the other heirs of tailzie; yet as entails are *ſtrictiſſimi juris*, and the favour of law is againſt all reſtrictions, this intention of the tailzier can have no effect, as he has not expreſſed it in plain and explicit words: nor will the law allow of an extenſion of ſuch reſtraints upon property from implication or artificial arguments; as has been again and again decided by the court.

Anſwered for the defender: To the firſt, The law defines an heir to be, *qui ſuccedit in jus defuncti*. *Heirs of tailzie and proviſion*, conſidered as technical terms of the law of *Scotland*, include every perſon who ſucceeds by deed to another, whether mediately or immediately, whether as diſponee or inſtitute, or as a ſubſtitute nearer or more remote; and therefore *James Balfour*, though the diſponee, is in a proper legal ſenſe, an heir of tailzie and proviſion to *Michael Balfour*, the maker of the entail, and certainly took this eſtate by ſucceſſion to him in virtue of a deed which is plainly of a teſtamentary nature, to take place only upon the death of the diſponer, who reſerved to himſelf, not barely a liferent, but ſuch powers of property as the law conſtrues to be equal to a fee; and although he is the heir firſt named, he does not appear to be a diſponee in any other or higher ſenſe than all the other heirs of tailzie are in their own order, whom it is not diſputed the reſtrictions do affect. From comparing the whole clauſes of this entail, it is apparent, that the maker of it has uſed the words *heirs of tailzie* as deſcriptive of all that were to ſucceed to him, whether the inſtitute or laſt ſubſtitute; and as his expreſs and anxious intention was, to limit thoſe heirs whom he was creating, by certain proviſions and conditions, it ſeems impoſſible to maintain, that the very firſt of theſe heirs ſhould be

be free of all theſe conditions, and left at liberty at once to defeat the declared purpoſe of the teſtator.

To the ſecond, There appears no good reaſon why a perſon ſhould not be underſtood according to his intention, when ſpeaking in an entail, as well as in any other deed. It is true, entails are held to be ſtrictly, but at the ſame time they ought to be fairly interpreted; and while they are ſupported by the ſanction of law, they ought to receive their full effect, when there are plain words to ſupport the clear meaning of the tailzier.

" The Lords found, That *James Balfour*, the granter of the bond " purſued on, was not reſtricted from contracting debts, he be- " ing diſponee, and the reſtriction only laid on the heirs of tailzie; " and therefore found the defender, who admits ſhe is heir of " tailzie to the ſaid *James*, liable in payment of the ſums libel- " ed." G. C.

Act. *Alex. Hay.* Alt. *Macintoſh.*

N° CI. 15th *February* 1758.

ROBERT KER of HOSELAW,

AGAINST

Mr JAMES TURNBULL.

Heir of entail taking a diſcharge, as well as an aſſignation to a debt of the tailzier's, if he can ſtill keep up the ſame as a debt againſt the entailed eſtate?

ANdrew *Ker* of *Hoſelaw*, in 1724, executed a deed of ſtrict ſettlement or tailzie of his eſtate of *Hoſelaw*; whereby, failing heirs of his own body, ſeveral of his nephews, *&c.* were ſubſtituted in their order, and burthened with the payment of his debts and legacies.

The ſaid *Andrew Ker*, in 1723 and 1724, had granted two bonds, the one for 3000 merks to *Aliſon Callender*, and the other for 600 merks to *John Alexander*; which were the only debts he left behind him.

He was ſucceeded in this entailed eſtate by *Andrew Ker-Reid*, who, having paid off the debts above mentioned, got them diſcharged, and at the ſame time took aſſignations to the two bonds, in order to keep them up as debts upon the eſtate, and thereby to ſerve as a fund for providing his younger children.

In 1747, Mr *Ker-Reid* conveyed theſe bonds and aſſignations to his daughter, adding to the deſcription thereof the following words: " I " being willing and deſirous, that the ſaid ſum ſhould remain and " abide as a debt upon the lands and eſtate of *Hoſelaw*, as the ſame " was a debt of the entailer."

The defender, Mr *James Turnbull*, intermarried with the daughter of the ſaid *Andrew Ker-Reid* in 1755, who conveyed to him all that ſhe was poſſeſſed of, and, *inter alia*, the two bonds above mentioned.

Robert Ker-Reid, the only ſon of *Andrew Ker-Reid* who ſurvived him,

him, died; and was ſucceeded in the entailed eſtate by the purſuer, a diſtant couſin; who brought a proceſs of reduction of theſe two bonds againſt the defender, concluding, That it ſhould be found, that they did not affect the entailed eſtate: and, particularly with regard to the ſaid bond for 3000 merks, he *contended*, That as by the terms of the diſcharge, and aſſignation thereof, the creditor had, in expreſs words, diſcharged the ſaid *Andrew Ker-Reid*, who paid the debt, *and all others the repreſentatives of the ſaid Andrew Ker, the granter of the bond, of the ſums therein contained*, the debt was thereby ſunk and ſopited, as to the heir of entail paying; and muſt alſo be extinguiſhed as to the purſuer; and could not be revived by the after aſſignation to the defender or his author. An heir of entail paying the tailzier's debts, has not, *de jure*, relief againſt the next heir of entail. It is at beſt but a device of the law, which permits heirs of entail to keep up theſe debts, by taking aſſignments thereto in name of a truſtee for their behoof. But where, as in the preſent caſe, the heir of entail pays the debts, and takes a diſcharge thereof, not ſingly to himſelf, but to the other repreſentatives of the tailzier, the debt is ſopited and extinguiſhed.

Anſwered for the defender, Mr *Ker-Reid*'s intention to keep up this bond as a debt againſt the entailed eſtate, is clear, from the aſſignation, though it is inaccurately wrote, and from the whole circumſtances of the caſe; and where ſuch intention is clear, and it has appeared, that the heir did not intend to ſink his money into the eſtate, ſuch debts have always been found to ſubſiſt in his perſon, notwithſtanding a diſcharge being granted. This was expreſsly found in the caſe of *Gordon* of *Gairty* againſt *Sutherland* of *Kinminity*, 29th *January* 1731; and alſo in another caſe, 22d of *February* 1706, *Temple* againſt *Cairns*. In the preſent caſe, ſome ſuperfluous words have been added in the diſcharge; yet as Mr *Ker* is *aſſigned to the principal bond, haill ſtrength and effect thereof*, &c. it is plain the parties did not underſtand, that by the diſcharge the bond was to be extinguiſhed. And although the creditor diſcharges not only Mr *Ker*, but all others the repreſentatives of the granter of the bond, theſe words can only mean, thoſe who were at that time liable; and can never be conſtrued to extend to the purſuer, a remote heir of entail, who was not then in being.

"The Lords repelled the reaſons of reduction." G. C.

Act. Lockhart. *Alt. Pat. Murray.*

N° CII. 15th *February* 1758.

Major WILLIAM CUNINGHAM of ENTERKINE,

AGAINST

WILLIAM WEMYSS writer in *Edinburgh*.

Wadſet-ſum conſigned, after an order of redemption uſed, but before decreet of declarator, found not arreſtable.

Robert Ludgate in *Coldingham*, in 1745, diſponed certain ſubjects, lying in the town of *Coldingham*, to *Robert Robertſon*, and others, his

creditors, jointly, their heirs and aſſignees, under this proviſion, " That the ſaid lands ſhall be redeemable at any term betwixt and the " term of *Martinmas* 1753 *incluſivè*, upon premonition of ſixty days, " and payment-making to them of a certain ſum of money."

In *March* 1751, Lieutenant-Colonel *John Cuningham* purchaſed this wadſet-right from the ſaid *Robertſon*, &c. for a certain ſum of money; and of that date they executed a conveyance of the ſubject in his favour, redeemable in terms of the diſpoſition to them.

William Ludgate, ſon and heir to the ſaid *Robert Ludgate*, the original reverſer, at the term of *Martinmas* 1753, duly uſed an order of redemption; and having taken a proper inſtrument againſt Colonel *Cuningham* for not receiving the money in terms of the clauſe of redemption, conſigned the wadſet-ſum in the hands of one *Matthew Craig*.

Major *William Cuningham* being creditor to the ſaid Colonel *John Cuningham*, arreſted the conſigned ſum in the hands of the ſaid *Matthew Craig*: and *William Wemyſs* writer in *Edinburgh*, another creditor of Colonel *Cuningham*'s, uſed arreſtment in the hands of the ſaid *Matthew Craig*, and likewiſe in the hands of *William Ludgate* the conſigner.

Major *Cuningham* being adviſed, that the above-mentioned arreſtments would be ineffectual, as the ſum ſtill remained heritable, no declarator of redemption having been obtained, although a ſummons of declarator had been raiſed in *January* 1755, procured from Colonel *Cuningham*, in *February* 1755, a diſpoſition to the wadſet-lands; and a competition having thereupon enſued upon a multiple-poinding raiſed by *Craig*, Major *Cuningham contended*, That the ſum conſigned not being moveable, could not be arreſted; and that therefore he was preferable in virtue of his foreſaid diſpoſition from the Colonel; and offered to accept of the wadſet-ſum without the trouble of a declarator.

Pleaded for Mr *Wemyſs*, the preferable arreſter, A wadſet-right is a mutual contract, by which the granter conveys an heritable ſubject, with this condition adjected, That when he uſes the order ſtipulated, he ſhall again return to his right of property in the ſubject, and the wadſetter ſhall have right to the redemption-money. It is true, after offer of payment, or conſignation made, by the reverſer, he may depart from the order of redemption, and thereby it becomes ineffectual: but if he proceed in his declarator, he is underſtood to have been reinſtated in his right of property, from the inſtant he uſed the order *agreed on*; and the decreet of court is only declaratory of that right. Thus Lord *Stair*, *lib.* 2. *tit.* 10. § 19. ſays, " It is the order that con- " ſtitutes the redemption; and the declarator but *finds and declares* it " to be orderly proceeded, and decerns the wadſetter to denude himſelf " conform thereto; and therefore, though the reverſion be perſonal, " excluding aſſignees, if that perſon once uſe the order, *he may aſſign* " *it*, and diſpone the lands as *redeemed*, and the aſſignee at any time " after his death will have intereſt to *declare*." And Sir *George Mackenzie*, in his title, *Of redeemable rights*, lays it down as a rule, " That " after an order of redemption is uſed, it may be aſſigned;" which ſhows plainly, that the conſigned money is affectable by arreſtment: which is confirmed by the opinions of *Direlton* and *Steuart*, in expreſs words, under the heads, *Arreſtment of conditional debts*, and *Wadſets*; *Steuart*'s words in particular being, " So ſoon as the order is uſed " for redeeming, it may arreſted; and the firſt arreſter will be pre- " ferred."

Anſwered

Anſwered for Major *Cuningham*, When a wadſet, or ſale under reverſion, is conſtituted, the ſame remains in the perſon of the wadſetter an heritable right, until he accepts of the redemption-money, or until a declarator of redemption: and in like manner, the redemption-money, which comes in place of the wadſet-lands, is alſo heritable *quoad* the wadſetter, until he require or accept of the ſum, or until decreet of declarator be obtained. The uſing the order of redemption, and conſignation of the ſum, by the reverſer, can have no effect to change the nature of the right *quoad* the wadſetter. That can only be done by the wadſetter himſelf, or the interpoſition of a judge. It is only the declarator of redemption that makes the redeemed lands belong to the reverſer, and makes the ſum conſigned moveable, and to deſcend to the wadſetter's executors. As therefore the ſum in queſtion is not moveable, no decreet of declarator having been obtained, it follows of courſe, that it is not arreſtable. *Stair*, *lib.* 3. *tit.* 1. § 37. ſays, "An arreſtment being laid upon ſums conſigned for a redemption, was not "found effectual till declarator of redemption paſs, *which only makes* "*the ſum moveable.*" See alſo *Craig*, *lib.* 2. *tit.* 6.; *Macdowal*, *lib.* 3. *tit.* 1. § 35.; Deciſions, 21ſt *June* 1626, *Murray*; 22d *February* 1666, *Lockhart*; 21ſt *January* 1673, *Nicol*; 8th *February* 1681, *Dunbar*.

"The Lords found the ſum not arreſtable; and therefore preferred "Major *Cuningham* upon his diſpoſition." G. C.

Act. *Wal. Steuart.* Alt. *Garden.*

N° CIII. 21ſt *February* 1758.

ROBERT AGNEW of SHEUCHAN,

AGAINST

The MAGISTRATES and TOWN-COUNCIL of STRANRAER.

Magiſtrates of a royal borough cannot accept of a compoſition from any one having property within the borough, for his ſhare of the public taxes.

IN the year 1683, the town of *Stranraer*, being one of the ſmalleſt of the royal boroughs, and having little or no trade, ſtood rated at two ſhillings, as its proportion of the *L.* 100 *Scots*, which is the imaginary ſtandard of the ceſs or land-tax payable by the royal boroughs; and paid the taxation according to that proportion.

Andrew Agnew of *Sheuchan*, father to the purſuer, was at that period proprietor of ſome houſes and other heritable ſubjects ſituated within the town of *Stranraer*; and as certain differences had then ariſen, touching the proportion of the public taxation which his property within the royalty ought to bear, theſe were adjuſted by a contract of agreement between him and the magiſtrates and town-council, dated 27th *July* 1683.

By this contract, *Sheuchan* and his heirs were taken bound to pay the

the annual ſum of *L.* 12 *Scots*, in full ſatisfaction of all taxations the magiſtrates or council of *Stranraer* might crave, out of the feu-duties, rents, or tenements therein particularly ſpecified, belonging to the ſaid *Andrew Agnew*. The contract, *inter alia*, contains this proviſo: "Re- "ſerving liberty to the magiſtrates, *&c.* and their ſucceſſors, to aug- "ment the ſaid *Andrew Agnew*, and his foreſaids, in his taxation, in "caſe the borough be augmented as to the King's ſupply, by the royal "boroughs."

Of late years the town of *Stranraer* having increaſed above two thirds, in trade, number of houſes, and inhabitants, beyond what it was in the 1683, the general convention of the boroughs raiſed their proportion of the *L.* 100 from two ſhillings to three ſhillings.

The borough being thus augmented in their quota of the general taxation, the magiſtrates thereupon took occaſion to increaſe *Sheuchan*'s proportion of the town's taxation, for his property within the borough, from *L.* 12 to *L.* 28, 16*s.*

Sheuchan complained of this procedure as unequal and unjuſt; and raiſed a declarator againſt the borough, for having it found and declared, "That he could only be aſſeſſed for his ſubjects within the bo- "rough of *Stranraer*, at the rate of *L.* 12 *Scots*, when the proportion "of the land-tax, laid by the royal boroughs upon the ſaid borough, "is the ſame as at the time of entering into the contract; and "with ſuch a proportion of *L.* 12 *Scots*, as any augmentation or "addition laid on the borough, bears to the proportion of the land- "tax to which it was liable at the time of the contract:" and *contended*, That as the town's taxation was only augmented one third, *viz.* from two to three ſhillings; ſo, in terms of the foreſaid contract, his property within the town might have been raiſed by the ſame proportion from *L.* 12 to *L.* 18, but no higher.

Pleaded for the town, The contract 1683 was contrary to law; and being *ultra vires* of the magiſtrates, was not binding upon the corporation. Magiſtrates are only adminiſtrators of the common good, and truſtees of the rights and privileges of the borough; and it would be a moſt dangerous innovation, to give them a power, at their pleaſure, to alienate or dilapidate the one or the other, or, by colluſion or favour, to exempt any perſon and his property for ever from payment of the public taxes, which are abſolutely neceſſary for the ſupport of the borough, and of our conſtitution. It would be deſtructive to the public, as well as pernicious to the private citizen, to permit magiſtrates to make perpetual compoſitions with particular people, and thereby overburden and oppreſs the reſt of the inhabitants whenever the exigencies of the ſtate ſhould require the impoſition of heavier taxes. The rule in law, and in the nature of the thing, could only be, That ſuch aſſeſſment ſhould be in equal proportion to the ſubjects and effects which are in the poſſeſſion of every individual. And this is the rule preſcribed by the act of convention 1667, which is uniformly obſerved, *viz.* "That the "commiſſioners are to take courſe that all perſons within the ſhires and "boroughs be equally and proportionally burdened." But this ſalutary rule would be at once deſtroyed, if compoſitions of this nature were to be admitted. And this point was expreſsly determined by the court in *January* 1681, in a caſe betwixt this very borough of *Stranraer* and the town of *Wigton*; where the town of *Stranraer* had obliged themſelves,

themſelves, by contract, to pay the fifth part of all aſſeſſments to be impoſed upon the town of *Wigton*; but the court found, that the magiſtrates and council of *Stranraer* could not burden their town with that proportion of the *Wigton* aſſeſſment, either by *contracting or paying it*.

Anſwered for *Sheuchan*, The purſuer is willing to pay a rateable augmentation upon the *L.* 12, in proportion to the increaſe of the taxation upon the town from two ſhillings to three ſhillings; but that they ſhould raiſe his *L.* 12 to *L.* 28, 16*s.* when the town itſelf is only raiſed one third, is manifeſtly unjuſt and oppreſſive. The argument for the defenders proceeds upon a falſe ſuppoſition, That a certain fixed rate had been aſcertained by the contract 1683, as the ſum that was to be paid in all time coming for *Sheuchan*'s property within the borough; which was by no means the caſe; for it was expreſsly provided in the contract, as above mentioned, That the *L.* 12 *Scots* payable by *Sheuchan* ſhould be increaſed in proportion to any augmentation laid upon the town; and this was no doubt extremely reaſonable, on account of the frequent alterations in theſe public taxations, and the fluctuating condition of boroughs. Individuals might be intitled to complain, were they to be overburdened, in laying on the taxation without proper conſideration being had to the property of a perſon who had entered into an agreement with the magiſtrates and town-council. But nothing of that kind can juſtly be alledged in the preſent caſe. The purſuer has regularly paid the *L.* 12 for his ſubjects in *Stranraer*, for almoſt ſeventy years, without any alteration; nor has the ſtent of other proprietors ſuffered any alteration during all that time; and now that a higher aſſeſſment is laid upon the borough, the purſuer contends, that, in terms of the contract, he can only be aſſeſſed, with others, in proportion to the general augmentation laid upon the town, and not arbitrarily, without regard to that proportion. And with regard to the power of the magiſtrates, like inſtances occur in ſeveral caſes, where they may validly make ſuch agreements. Thus they may grant charters of burgage-tenements to be holden feu of the borough, for payment of a trifling duty *pro omni alio onere*; whereby the borough is liable to relieve the vaſſals of their proportion of the public taxation, for which the borough is ſuppoſed to have received a valuable conſideration. The ſame thing holds in contracts of proper wadſet, and other inſtances of the like nature, in which it has never been doubted, that ſuch contracts were obligatory upon the borough.

" The Lords found, That the contract in the year 1683 was not " binding upon the borough." G. C.

Act. *Hamilton-Gordon, Lockhart.* Alt. *Dav. Dalrymple.*

N° CIV. 1st *March* 1758.

ROBERT BOGLE,

AGAINST

ROBERT CROSS.

Who has right to reclaim colliers?

James Gray of *Dalmarnock*, proprietor of a coal-work near *Glaſgow*, gave it up ſome years ago, and allowed his colliers to go to what maſters they pleaſed. Six of them, at length, with conſent of *James Gray*, ſettled at a coal-work belonging to *Robert Bogle* of *Shettleſtone*; where ſome of them remained leſs, and others more than a year, when they were enticed away by *Robert Croſs* of *Barrachny* to his coal.

James Gray, notwithſtanding the diſmiſſion of his colliers, had been in the regular uſe of requiring them back annually from the maſters they worked with, in order to preſerve his right to them, in caſe he ſhould ever ſet up his coal again.

Mr *Bogle*, upon the deſertion of the colliers, as above, reclaimed them from Mr *Croſs*, alledging, that he had a preferable right to them, in reſpect of their having been fixed to his coal with conſent of the former proprietor.

Anſwered for Mr *Croſs*, The laws reſpecting colliers give this right of reclaiming only to the original maſter. But here *Gray* is the maſter, and *Bogle* has the enjoyment of them only *pro tempore*, by his allowance. 2*do*, At any rate, the right of reclaiming belongs only to that maſter who has been in poſſeſſion of the collier for year and day; and therefore the purſuer cannot reclaim ſuch of the colliers as have not ſerved him for that time.

" The Lords found the purſuer not intitled to recover any of the " colliers in queſtion." J. D.

Act. *Miller, Hamilton-Gordon.* Alt. *Dav. Dalrymple.*

N° CV. 3d *March* 1758.

ANDREW ANDERSON,

AGAINST

ARTHUR NASMYTH.

An expired adjudication, with infeftment, will be cut off by the negative preſcription, if no poſſeſſion has followed.

IN a competition upon a mails and duties, *Andrew Anderſon* founded on an adjudication in the year 1682, of the common ſubject, on which

which infeftment had immediately followed, but no poſſeſſion at any time. *Arthur Naſmyth* founded on an adjudication of the ſame ſubject in the year 1690, on which infeftment followed in the year 1745, and poſſeſſion.

Objected by *Naſmyth* to *Anderſon*'s title, That it was loſt by the negative preſcription, no poſſeſſion having followed on his adjudication.

Anſwered for *Anderſon*, An expired adjudication with infeftment, though no poſſeſſion has followed upon it, cannot be loſt by the negative preſcription, unleſs another has acquired by the poſitive. Adjudication is not merely a right in ſecurity, but is a right of property, redeemable within the legal, but irredeemable after; and it is a rule of law, That a right of property cannot be loſt *non utendo*. This has never been called in queſtion ſince the deciſion 24th *December* 1728, Preſbytery of *Perth* againſt the Magiſtrates: And, upon the footing of this rule, *Anderſon*'s adjudication is ſafe.

Replied for *Naſmyth*, An adjudication in itſelf is merely a diligence of law. Within the legal, it is obviouſly, although infeftment follows upon it, no more than a ſecurity. Whatever appriſings may have been in their origin, it has been the continual aim of courts, and of parliaments, to ſoften their ſeverities; and in many events to limit them to be ſecurities, when in ſtrict law they might have been intitled to be deemed rights of property. The preſumption of law then is, That as adjudications within the legal are rights in ſecurity, ſo even after the legal is expired, they continue to be rights in ſecurity, and remain of their former nature, unleſs the party who is intitled by particular laws to convert them into rights of property, ſhows his intention to take advantage of thoſe laws, by ſome ouvert act. The law of itſelf does not in a moment tranſmute what within the legal was a right of ſecurity, into a right of property, when the legal is expired: but it allows the creditor to make this tranſmutation. It preſumes the diligence of adjudication to retain ſtill its primary nature; but it allows this preſumption to be thwarted by the creditor; and if he neglects to do ſo for forty years, he loſes the right to do ſo at all.

The general ſtrain of our law on this ſubject, proceeds on the ſame plan. After the legal, a man may either accept the irredeemable property of the lands *in ſolutum* of his debt, by ſhowing his intention to do ſo; or he may repudiate the property, and hold his appriſing only as a ſecurity for the debt. So it is laid down by Lord *Stair*, *lib.* 3. *tit.* 2. *par.* 30. who ſays, " That infeftment upon an adjudication remains " but as a ſecurity, which the appriſer may renounce, or make uſe of " other ſecurities till he be ſatisfied. — The like, though after the legal " was expired." And ſo the Lords decided, *December* 7th 1631, *Scarlet* againſt *Paterſon*, where it was found, " That an expired appriſing " hindered not the appriſers to purſue the heir of the debtor for the " ſame debt; and that, notwithſtanding thereof, the creditor might " compriſe the heir's lands and poind his goods for ſatisfaction." And Lord *Stair*, in the above paſſage, taking notice of this deciſion, obſerves ſpecially, *But here the appriſer had attained no poſſeſſion.* From which it is plain, Lord *Stair* underſtands, that poſſeſſion is the criterion to conſtitute the adjudication a right of property, or a right in ſecurity: for if the appriſer had in that caſe attained poſſeſſion, he muſt have kept the lands appriſed in ſatisfaction *pro tanto* of his debt, and could neither have

compriſed

compriſed the heir's lands, nor poinded his goods; whereas, by not entering to poſſeſſion, and waving his privilege to take the property, he kept up his adjudication only as a ſecurity and burden upon the property.

From this reaſoning, the conſequence is direct, that the adjudication in queſtion being only a ſecurity or burden, is, like other ſecurities and burdens, ſubject to the negative preſcription.

2*dly*, The rule eſtabliſhed in the caſe of *Perth*, does not apply to the preſent caſe. When a man pleads the negative preſcription, who has no title in him, but merely that of poſſeſſion, who can plead no right but *poſſideo quia poſſideo*, he will not be heard; and on this principle the deciſion of the town of *Perth* went. But when one can ſhew a right to the ſubject, he may then plead the negative preſcription. And in the preſent caſe, *Naſmyth* having adjudged the right of reverſion competent to the original debtor, and got the poſſeſſion, may plead every right which his author could have pleaded.

" The Lords found *Anderſon*'s adjudication preſcribed." J. D.

For *Anderſon, Arch. Murray, Lockhart.* Alt. *J. Dalrymple.*

N° CVI. 4th *March* 1758.

WILLIAM BURGES,

AGAINST

MARY HALLIDAY.

Which of the parents is preferred to the cuſtody of a baſtard child?

IN *Auguſt* 1755, an action was brought by *Mary Halliday* againſt *William Burges*, whoſe ſervant ſhe had been, before the juſtices of peace of the county of *Dumfries*, for one half of the maintenance of a child, of which ſhe had been delivered two months before.

The juſtices found it proved, by the acknowledgment of *Burges*, that he was father of the child; and found him liable for 20 *s.* claimed as the half of the childbed-expences, and alſo for the half of the expence of alimenting, cloathing, and maintaining the child yearly, till ten years of age; and modified the father's ſhare to 50 *s. Sterling* yearly, payable to the mother at two terms in the year.

Some months after *Mary Halliday* was married to *Matthew Wilſon*, *Burges*, the father of the child, required, under form of inſtrument, that the child might be delivered to him; " declaring, that for the fu-
" ture, neither *Mary Halliday* nor her huſband ſhould be troubled with
" the child in alimenting or cloathing him, but that he would do it
" upon his own expence."

Mary Halliday and her huſband refuſed to deliver the child; and, at the diſtance of two years, charged *Burges* for payment of his part of the aliment. Of which charge he obtained a ſuſpenſion, and *contended*, That as he had offered to maintain the child, he could not be obliged to pay any part of the maintenance to the mother, who had refuſed to give

give up the cuſtody of the infant; for that he was intitled, as father, to the cuſtody and education of the child: That with regard to legitimate children, it was undoubted, that the father had the ſole power of determining where they ſhould be educated, even from their moſt tender infancy.—In the Civil law, the father had not only that power during his life; but his directions were regarded after his death, and were never receded from, but on account of very peculiar circumſtances; *l.* 1. § 1. *ff. Ubi. pup. educ. vel mor. deb.* If the father gave no directions, then the mother ſeems to have been preferred to the tutor during the infancy of the child; but under this expreſs exception, That if ſhe married a ſecond huſband, ſhe was not intruſted with this office; *l.* 1. *C. Ubi. pup. educ. deb.*

In this country it has been often diſputed, after the father's death, Whether the tutor, the ſuperior, or the mother, had right to the cuſtody of the pupil's perſon? And though the mother has, in many caſes, been preferred to the cuſtody till the child was ſeven years old; yet, where ſhe had married a ſecond huſband, the tutor had been preferred, even when the child was under ſeven years, though the mother offered to aliment him *gratis*; 28th *February* 1632, *Gordon contra Corſaw*, *Dictionary of deciſions*, *vol.* 2. *p.* 484.

A father is adminiſtrator in law to his natural children in the ſame manner as to his lawful iſſue. This was decided 17th *March* 1624, *Tough*: in which caſe, the Earl of *Home* had preſented a natural ſon of his, who was under age, to a provoſtry; the ſon aſſigned the rents to *Tough*; but the tenant made payment to the father, as lawful adminiſtrator to his ſon, which he applied to the ſon's education and aliment. This payment was ſuſtained to the tenant, in competition with the aſſignee.

The father's right, in preference to the mother, ſeems therefore eſtabliſhed in all caſes; but more particularly, where not only the mother has married another huſband, but the child is no longer upon the breaſt, being almoſt three years old.

Anſwered, The right of fathers to the cuſtody and education of their lawful iſſue, does not apply to the caſe of natural children. Their connection with the mother is the ſtrongeſt, becauſe, as to her, there is no uncertainty: but the father, from the doubt he muſt, for the moſt part, entertain, and his little connection with the child during its infancy, cannot in general be attached to it by the ſame affection as the mother; and therefore the cuſtom has been to put theſe children under the care of the mother.—The deciſion 17th *March* 1624, *Tough*, related to the caſe of a gift from the father to his natural ſon, of which he was no doubt intitled to the adminiſtration; and therefore does not apply.

The marriage of the mother makes no alteration in the caſe of a baſtard child. A mother indeed who has the keeping of her lawful iſſue till a certain age, loſes that privilege upon her taking a ſecond huſband; becauſe, in that caſe, there is always ſome near relation of the child, or ſome other perſon whom the law intruſts, ready to undertake the charge; but no perſon ſtands in any degree of relation to a natural child, or with whom it has a chance of being ſo well taken care of as with the mother: and, in the preſent caſe, the mother would rather

conſent to be at the whole expence of maintaining the child than give up the cuſtody.

" The Lords repelled the reaſons of ſuſpenſion, and found the let-
" ters orderly proceeded." W. J.

For the ſuſpender, *Johnſtone*. Alt. *Hew Dalrymple*.

N° CVII. 16th *June* 1758.

The MANAGERS of KING JAMES VI.'s HOSPITAL in PERTH,

AGAINST

The MAGISTRATES and TOWN-COUNCIL of PERTH.

Preſcription.

BY the moſt ancient charters of the borough of *Perth*, there was a feu-duty of *L.* 80 *Sterling* payable to the crown.

Before the reformation, *L.* 69 : 8 : 8 *Sterling*, part of the ſaid feu-duty, was granted in alms by the crown to the prior and convent of *St Andrew's*, and other religious houſes.

After the reformation, King *James* VI. by a charter dated 9th *Auguſt* 1569, granted " to the poor members of *Jeſus Chriſt* reſiding within " the town and territory of *Perth*," all lands, tenements, revenues, *&c.* which had belonged to the *Carthuſian* friars, the *Dominican* friars, and other religious houſes within the ſaid town and territory ; " as alſo all " rents or revenues whatever, which had been paid from the town or " territory of *Perth*, to any religious houſes within the kingdom of " *Scotland*." By virtue of this grant, the poor of *Perth* had, *inter alia*, right to the *L.* 69 : 8 : 8 *Sterling*, part of the town's feu-duty, which had been granted to the prior of *St Andrew's*, *&c.*

This grant was confirmed by another charter from the crown, and ratified in parliament 1587 ; and again by a third charter in 1592. By theſe charters, the whole ſubjects thereby granted, were united and incorporated by the name of *the King's hoſpital in Perth* ; and put under the adminiſtration of hoſpital-maſters, to be annually choſen by the miniſters and elders of *Perth* ; who were injoined ſtrictly to apply the funds ſolely to the ſuſtenance of the poor of the hoſpital ; and bound to account for their management, " non ſolum ſuperintenden-
" tibus ac commiſſionariis patriæ, ac miniſtris et ſenioribus dicti burgi,
" ſed etiam *in noſtro ſcaccario*, prout ad idem requiſiti fuerint."

In 1600, the borough of *Perth* obtained a charter from the ſame King, commonly called the *town's great charter*, ratifying all the town's former rights. This charter recites the King's gift to the hoſpital and poor of the town, before the acts of annexation of the above *L.* 69, 8 *s.* 8 *d. Sterling*, part of the town's feu-duty, and another gift of the reſidue of the feu-duty to the community itſelf, *ad ſuſtentationem pontis de Tay*.—The *Reddendo* of this charter bears, " Reddendo inde annua-
" tim præfati præpoſiti, balivi, *&c.* nobis, et ſucceſſoribus noſtris,
" dictam

" dictam ſummam octoginta librarum, monetæ Sterlingarum.—De qui-
" bus dictis firmis burgalibus dictæ ſummæ octoginta librarum, monetæ
" Sterlingarum, nos, cum aviſamento, *&c.* nunc, ut ante et prius,
" dedimus, conceſſimus, *&c.* prout, tenore præſentis cartæ noſtræ,
" damus, *&c.* præfatis hoſpitali et pauperibus dict. noſtri burgi de
" Perth, *in puram et perpetuam eleemoſynam*, dictam ſummam ſexaginta
" novem librarum," *&c.* The charter, in the ſame manner, confirms the grant of the reſidue of the feu-duty to the community, and authoriſes the court of exchequer to give credit and allowance, in accounting for the feu-duty, of the ſums ſo allocated to the hoſpital and community, *tanquam ſolut.*

Managers had from time to time been elected for the adminiſtration of the hoſpital-funds; but they either knew nothing of the hoſpital's right to this part of the town's feu-duty, or neglected to recover it, till the 1756.—The magiſtrates of the town had, in the mean time, fitted accounts annually in exchequer; and in diſcharge of their feu-duty of *L.* 80 *Sterling*, had regularly taken credit for the above-mentioned ſum of *L.* 69 : 8 : 8 *Sterling*, as " payable to *the poor of the hoſpital of the* " *ſaid borough*, granted in perpetual alms, and which was in uſe to be " paid to the prior of *St Andrew's*," *&c.*; as alſo, for the ſum of *L.* 10 : 11 : 4 *Sterling*, granted for repairing the bridge of *Tay*. — But from the 1743 downwards, the ſtyle of their *Æques* was altered, and bore only, that the town was allowed *L.* 69 : 8 : 8, " granted in perpe-
" tual alms, and which was in uſe to be paid to the prior of *St An-*
" *drew's*," &c.

Some of the managers having at length diſcovered, that the hoſpital had right to that part of the feu-duty by the town's charter, they brought an action againſt the magiſtrates and town-council for declaring that right, and for recovering payment of the ſaid annual ſum for forty years bypaſt, and in time coming.

The chief defences proponed for the town were, 1*mo*, That the hoſpital's right to this part of the town's feu-duty was cut off by the negative preſcription; and, 2*do*, That the town at leaſt could not be liable in bygones or arrears, as the ſame were *bona fide conſumpti.*

Anſwered for the purſuers, to the *firſt* defence, 1*mo*, It is incompetent for the borough to plead the negative preſcription. This being part of the feu-duty contained in the town's charter, which has been ever ſince their title of poſſeſſion, the right to it is incapable of being loſt by ſuch preſcription. And ſuppoſing, in a queſtion between the hoſpital and the crown, preſcription might be proponable by the latter; yet it is *jus tertii* for the town to plead it here. — 2*do*, The hoſpital's right has been acknowledged as ſubſiſting, in all the *Æques* fitted by the magiſtrates in exchequer down to the 1743; and the ſame allowance has been taken in the *Æques* fitted ſince that time, though the mention of the hoſpital in them has been unwarrantably omitted.

Replied for the town, 1*mo*, The hoſpital is in the ſame caſe as lords of erection, who have right to feu-duties, though the ſuperiorities remain in the crown. — The crown was here abſolutely diveſted of the right now claimed by the hoſpital; and as the hoſpital could effectually diſcharge a right which was granted to it *in perpetuum*, ſo it could loſe that right by the negative preſcription, which is a legal diſcharge. The hoſpital is not the ſuperior of the town, which has no ſtronger connection

connection with it, than with any third party, who has a real burden upon their lands. Where a right is conſtituted by a charter in favour of the ſuperior, it cannot be loſt while the vaſſal poſſeſſes; becauſe the ſuperior poſſeſſes by him: but where it is in favour of a third party, the vaſſal holds nothing of ſuch party, nor poſſeſſes for him; and therefore the right of that third party, *tanquam quilibet*, may be cut off by the negative preſcription. The queſtion here is not as to the crown's claim to the feu-duty, but with reſpect to the hoſpital's right thereto; and if ſuch right is loſt, it muſt be deciſive of the cauſe. And, *2do*, The *Æques* fitted in exchequer ſhow, that the crown-officers conſidered the crown as totally diveſted of this feu-duty. By the charter 1600, theſe officers were directed to diſcharge the town of this *L.* 69 : 8 : 8 *tanquam ſolut.* to the hoſpital, as the crown was to have no further intereſt therein. The *Æques* do not prove, that this annuity was paid to the hoſpital; ſo cannot ſtop preſcription. And beſides, the hoſpital was not party to them; and the law requires document to be taken by the party who is the creditor, for interrupting preſcription.

Duplied for the hoſpital, This is not a ſeparate right, liable to preſcription. The whole feu-duty by the charter is made payable to the crown; but a part of it only allocated for ſupport of the hoſpital, whoſe managers are alſo accountable in exchequer. The officers of the exchequer, in counting, ought therefore to have demanded production of a receipt, as allowance was only meant to be given, if the money was actually paid to the hoſpital, as if it were paid to the crown. The real right to the whole feu-duty ſtill remained in the crown as ſuperior, and could not be loſt by the negative preſcription, unleſs acquired to ſome other by the poſitive; which is not pretended. The hoſpital is not a third party, or aſſignee to the crown's right; but is only a donatar to part of the profits of it; and therefore, ſo long as the town continues liable in the feu-duty to the crown, it muſt be bound to pay this part of it to the hoſpital, as a condition of their own charter. This is agreeable to the deciſions in the caſes of Lord *Hatton contra* the town of *Dundee*, 9th *December* 1679; and the Earl of *Findlater contra* the town of *Banff*, decided in 1752.—Even ſuppoſing the hoſpital's right to be merely perſonal, and liable to be extinguiſhed by the negative preſcription, ſtill the town could not thereby receive any benefit. As the crown would in ſuch event be intitled to the feu-duty in queſtion by virtue of the charter; conſequently it muſt be incompetent for the town to plead an objection againſt the hoſpital, which would not be available to it againſt the crown.

As to the other queſtion, relative to the hoſpital's claim for the bygone feu-duties, ſuppoſing the right itſelf to be ſubſiſting:

Pleaded for the town, No demand was made for 150 years paſt. The magiſtrates of boroughs are annually changed, and have ſeldom occaſion to examine their ancient rights. Here they followed the example of their predeceſſors; and *bona fide* beſtowed this feu-duty upon the common exigencies of the community.

Anſwered for the hoſpital, The right appeared *in gremio* of the town's great charter, and was noticed in every clearance made by the town in exchequer. It cannot be preſumed, therefore, to have been unknown to the magiſtrates, who are barred from pleading a *bona fides* under ſuch circumſtances.

" The

"The Lords repelled the defence of the negative preſcription; and "found, that the hoſpital has right to the *L.* 69:8:8 in queſtion; "and remitted to the Ordinary to hear parties with reſpect to by-"gones." D. R.

Act. *Macintoſh, Dav. Dalrymple, Williamſon, Lockhart. Ferguſon,* Alt. *Jo. Craigie, And. Pringle, Advocatus.* Reporter, *Kilkerran.* Clerk, *Kirkpatrick.*

N° CVIII. 17th *June* 1758.

ALEXANDER BROWN, factor for the executors of WILLIAM SCOULAR,

AGAINST

ALEXANDER SCOULAR.

If a factor loco tutoris *has power to enter into a ſubmiſſion?*

William Scoular died in *October* 1748. His heritable ſubjects deſcended to *Alexander Scoular*, his eldeſt ſon; his moveable effects divided amongſt his relict and five younger children. Application was made to the court of ſeſſion; and *John Watſon* was appointed factor *loco tutoris*, on account of the infancy of four of the children.

Mr *Watſon* diſcovered, in the courſe of his management, that *Alexander Scoular* had abſtracted part of his father's moveable eſtate, to the prejudice of the executors; and having brought an action againſt him before the ſheriff, he acknowledged his intromiſſion, to the extent of *L.* 10.

Mr *Watſon* gave up this factory; and *Alexander Brown* was appointed by the court in his place, in *February* 1754. This was done upon the application of the relict and all the children; the eldeſt of whom, *Helen Scoular*, was before this time married to *Robert Hunter*, who concurred in the application. *Brown inſiſted* in the proceſs before the ſheriff, againſt *Alexander* the eldeſt ſon; and a proof was taken with reſpect to his intromiſſions; in conſequence of which the ſheriff found it proved, that the defender had intromitted with leather belonging to his father, to the extent of *L.* 10, 15 *s.*; and with lime and ſand to the extent of *L.* 1, 5 *s.*; and with certain quantities of bark, but found no evidence as to the extent or value thereof; and with ſeveral barrels of oil, but found no proof of the value thereof.

This judgment of the ſheriff was brought before the court of ſeſſion, by advocation, when a further proof was allowed: upon which a ſubmiſſion was entered into by *Alexander Scoular*, on the one part, and by *Alexander Brown*, the factor, with the ſpecial advice and conſent of *Anne Donaldſon* the relict, and of her ſecond huſband, on the other part; ſubmitting to Mr *Francis Garden* all claims and demands which the executors of the deceaſed *William Scoular*, and *Anne Donaldſon*, his relict, had againſt *Alexander*, or that he might have againſt them, and particularly the proceſs then depending.

The arbiter again examined *Alexander Scoular*, and ſeveral other witneſſes; and upon the 17th of *Auguſt* 1757, pronounced a decreet-arbi-

tral, finding *Alexander Scoular* liable in *L.* 127, as the price and value of his intromiſſions, *L.* 52 as the expence of proceſs, and *L.* 40 in name of damage and *ſolatium*.

Alexander Scoular brought a reduction of this decreet-arbitral; and the Lord *Colſton* Ordinary "found, That *Alexander Brown, qua* factor *loco tutoris*, had no power to ſubmit any claims competent to the pupils; and, 2*dly*, That he had no power to ſubmit the claim competent to *Helen Scoular* their ſiſter, who was major, and married, not only at the date of the ſubmiſſion, but alſo at the date of the factory granted to *Alexander Brown*."

Pleaded for *Alexander Brown*, in a reclaiming petition, That a factor *loco tutoris* for managing the affairs of an infant is intitled to ſubmit, where ſuch ſubmiſſion appears a prudent or rational act of adminiſtration; ſince it is now an eſtabliſhed point, That a tutor may effectually ſubmit: and though a factor *loco tutoris* is not in every reſpect equal to a tutor; yet he is intitled to act *tanquam bonus paterfamilias*; though in every act of adminiſtration he is anſwerable for the riſk, if it ſhall turn out againſt the intereſt of the pupil.

2*dly*, In this caſe *Alexander Scoular* ſought and obtained this ſubmiſſion, when he knew the character with which the factor was veſted; and therefore he is barred *perſonali exceptione*, from objecting to the petitioner's title or powers, when he was ſatisfied to ſubmit with him in that character: and the ſubmiſſion itſelf expreſsly ſets forth, that *Alexander Brown* entered into the ſubmiſſion as factor. If a perſon contracts with a minor, he is not intitled to be relieved from his bargain, becauſe the minor has a right *intra annos utiles* to reduce it, if to his prejudice. At any rate, *Alexander Scoular* can only demand caution, that he ſhall be kept ſafe from any challenge upon the part of the executors.

As to the *ſecond* objection to the decreet-arbitral, *Helen Scoular* and her huſband are ready to join in the diſcharge to *Alexander*. 2*dly*, The act of factory was obtained upon their application, as well as that of the younger children; and therefore the factor was authoriſed to act for her, as well as for the infants; and muſt be underſtood to have taken burden for her, by entering into the ſubmiſſion, and to be bound to procure her conſent.

Anſwered, It has been conſidered as a doubtful queſtion, How far tutors, properly authoriſed, whoſe office gives them the total adminiſtration both of the pupil's perſon and eſtate, have power to ſubmit, ſo as to bind their pupils when they come to be of age, unleſs where the tutor takes burden upon him for them? but it can admit of no doubt, that a factor named by the court for the ſpecial purpoſe of managing the moveable effects of the defunct, can have no power to ſubmit the claims of thoſe for whoſe behoof he is appointed factor.

By the ſequeſtration, the whole moveable effects, in this caſe, were put into the hands of the court; and by them no power to ſubmit was delegated to the factor.

In this caſe, the ſequeſtration and factory did not ſingly reſpect the intereſt of the infants.—The relict had her ſhare.—The daughter of the firſt marriage, and her huſband, had alſo a ſhare: but as they could not divide with the infants till the debts were called in, they joined in the application for a ſequeſtration and factory; but this conſent could

not imply any intention to authoriſe the factor to enter into a ſubmiſſion for them.

As the factor exceeded his powers, by entering into the ſubmiſſion, and his deed could not therefore bind the children or relict, neither can *Alexander Scoular* be bound. Nor is this objection barred *perſonali exceptione*. The ſubmiſſion appears plainly to have been entered into upon an erroneous ſuppoſition, that the factory intitled the factor to ſubmit; and this miſtake cannot render it binding upon either party. It is of no conſequence, that the children are now willing to ratify the ſubmiſſion.

"The Lords found the decreet-arbitral binding upon *Alexander* "*Scoular*, and remitted to the Lord Ordinary to proceed accord- "ingly; and found *Alexander Scoular* liable in the expence of ex- ". tracting the decreet." W. J.

Act. *R. Dundas.* Alt. *Lockhart.* Clerk, *Kirkpatrick.*

N° CIX. 20th *June* 1758.

MARY MACDONELL,

AGAINST

His MAJESTY's ADVOCATE.

Proviſions to daughters contained in a marriage-contract, when due?

BY contract of marriage in 1730, between *Archibald Macdonell* of *Bariſdale* and *Iſabel Mackenzie*, the ſaid *Archibald*, and his eldeſt ſon of a former marriage, *Col Macdonell*, became jointly bound in favour of the daughters of the marriage, in theſe words: "And in caſe "there be only daughters procreate of the ſaid marriage, and no heirs- "male exiſting, then, and in that caſe, they the ſaid *Archibald* and "*Col Macdonells* hereby provide the ſaid daughters as follows, *viz.* If "there be only one daughter, to her the ſum of 1000 merks *Scots*; and "if there be two, three, or more daughters, to them all the ſum of "3000 merks, whereof a double portion to the eldeſt, and the remain- "der to the younger, equally betwixt them; *and in caſe of the deceaſe* "*of any of them, the portion of the daughter deceaſing after diſſolution* "*of the ſaid marriage, to fall and accreſce to the ſurviving daughters,* "equally betwixt them; and which portions and proviſions are and "ſhall be payable *at the firſt Whitſunday or Martinmas next and imme-* "*diately following the deceaſe of the ſaid Archibald Macdonell and Iſabel* "*Mackenzie*, when the ſame ſhall happen, with annualrent thereafter "during the not payment; and a fifth part of penalty in caſe of "failzie"

Of this marriage there were no heirs-male, and only two daughters, *Katharine* and *Mary*. The marriage diſſolved by the death of the huſband; but the wife ſtill ſurvives.

The eſtate of *Bariſdale* was forfeited to his Majeſty by the attainder of *Archibald Macdonell*, the eldeſt ſon of the ſaid *Col Macdonell*.

Mary

Mary Macdonell entered her claim in virtue of the clauſe before recited, to be found a creditor on the eſtate for 1000 merks, as her portion, with intereſt thereof from the time of her mother's death, whenever that event ſhall happen.

Objected for the crown, The obligation is only conditional, depending on the claimant's ſurviving her mother as well as her father; ſo that if ſhe predeceaſe her mother, nothing will be due. In all proviſions granted by a father to his children, it is an implied condition, That theſe children ſhould reſpectively ſurvive the term at which their proviſions are made payable. If they die before it, *dies nec cedet nec venit*; 16th *January* 1665, *Edgar*; 22d *February* 1677, *Belſches*; and 14th *January* 1730, *Bell*. The ſole intention of ſuch obligations is, to afford proviſion for the children themſelves; and therefore it cannot be preſumed to be the father's meaning, to make a ſum payable to the repreſentatives of the children, either *a teſtato vel ab inteſtato*, which the children themſelves could never have demanded.

Anſwered for the claimant, *Dies ceſſit* by her ſurviving the diſſolution of the marriage, *quamvis non venit* till her mother's death; but ſtill the ſum is a certain fund of credit, on which the claimant may contract or diſpoſe for her neceſſary ſuſtenance during her mother's life. The proviſo, That the portion of the daughters deceaſing *after diſſolution of the marriage*, ſhould fall to the ſurviving daughters, ſhows, that the parties intended the diſſolution of the marriage to be the term at which the proviſions became due, although payment thereof was to be ſuſpended till the death of the ſurviving parent.

" The Lords ſuſtained the claim for payment of the 1000 merks up-
" on the deceaſe of the mother, and annualrent thereafter." D. R.

Act. Sir *Dav. Dalrymple*. Alt. The Crown-lawyers.

N° CX. 21ſt *June* 1758.

THOMAS SIBBALD,

AGAINST

ANDREW FLETCHER.

Action of damages upon an indenture, againſt the cautioners of an apprentice who has inliſted.

IN 1750, *Walter Fletcher* was bound apprentice by indenture to *Thomas Sibbald* lockſmith, for ſix years and two months, without any apprentice-fee. His brothers *Andrew* and *William Fletchers* became bound as cautioners for him, under the penalty of *L.* 15 *Sterling*.

In 1755, ſixteen months before the elapſe of the term, *Walter Fletcher* voluntarily inliſted himſelf in the regiment of artillery, and went immediately on board a ſhip ready to ſail for *London*.

Thomas Sibbald charged the two cautioners with horning upon the indenture, for the penalty of *L.* 15; ſoon after which *William Fletcher*, one of the cautioners, died.

Pleaded

Pleaded in defence by *Andrew Fletcher*, the other cautioner, *1ſt*, That the indenture was null: for though it was wrote upon paper duly ſtamped, yet it had not been ſtamped in terms of the act 8*vo Annæ*, *c.* 9. upon payment of the duty impoſed upon apprentice-fees. *2dly*, That he can only be liable for one half of the damages incurred by the loſs of the apprentice, as being one of two cautioners, and not bound *conjunctly and ſeverally*. *3dly*, It was the duty of *Thomas Sibbald* to have claimed back his apprentice, notwithſtanding his having inliſted; in which caſe he muſt have been reſtored to him. *4thly*, The maſter cannot, in this caſe, be intitled to coſts of ſuit, becauſe he gave a charge for the whole penalty of *L.* 15, contained in the indenture, which was higher than his real loſs; whereas he ought to have brought an action by ſummons, and claimed no more than the true amount of his damage, as it ſhould be aſcertained by proof.

Anſwered, *1ſt*, The act 8*vo Annæ*, *c.* 9. does not require that indentures ſhould be ſtamped when no apprentice-fee is paid: for the purpoſe of the act was, to ſecure the duty payable upon apprentice-fees, of *6d. per* pound on every ſum under *L.* 50, and *1 s. per* pound for every ſum above *L.* 50; but where no duty is payable, no ſtamp is required: and it is the practice at the ſtamp-office, to refuſe to ſtamp indentures which contain no apprentice-fee. *2dly*, Cautioners, though bound ſimply, and without the words *conjunctly and ſeverally*, are notwithſtanding ultimately liable *in ſolidum*. They have indeed the benefit of diviſion, if the other cautioners are alſo ſolvent; but if, at the time of the action, as in the preſent caſe, the others are inſolvent, any one cautioner muſt make good the whole; Lord *Stair*, *b.* 1. *tit.* 17. § 12. Beſides, in this caſe the two cautioners became bound for the performance of an indiviſible fact, and muſt therefore be liable *in ſolidum*; 14th *June* 1672, *Sutherland*; 6th *July*, 1721, *Patrick Grant*. *3dly*, The maſter is not bound to demand his apprentice back when he deſerts his ſervice, and voluntarily inliſts, and is not impreſſed or carried off by force. Beſides, in this caſe, by his going on board a ſhip ready to ſail, the maſter had no opportunity to make a demand. *4thly*, The maſter was intitled to give a charge upon the indenture for the penalty, otherwiſe the clauſe of regiſtration would be inept; but in this, as in all caſes of penalties, the ſum charged for is to be underſtood as ſubject to the modifications of the court.

" The Lords found the defender liable in damages; which they mo-
" dified to *L.* 8 *Sterling*; but refuſed expences." W. J.

Act. *Johnſtone*. Alt. *P. Murray*.

N° CXI. 27th *June* 1758.

RIDDEL of NEWHOUSE,

AGAINST

The OFFICERS of STATE.

Patronage,—Novodamus,—*Preſcription.*

IN 1756, *Walter Riddel* of *Newhouſe* brought an action againſt the officers of ſtate, for having it declared, That the patronage of the pariſh-kirk of *Irongray* belonged to him.

The titles he founded upon were derived, by progreſs, from the ancient family of *Herries*, who had obtained from the crown, at different periods, grants of the barony of *Terregles*, (within which the kirk of *Irongray* was ſituated), *cum advocationibus et donationibus eccleſiarum dict. terrarum.* Particularly, in 1510, *Andrew* Lord *Herries* obtained a charter, proceeding on his own reſignation of the ſaid lands and barony of *Terregles*, which contains ſpecially the patronage of the ſaid kirk of *Irongray*. The *Quæ quidem* of this charter bears, That the ſaid barony and patronage, *&c.* had formerly belonged to the ſaid *Andrew* Lord *Herries*, and had been reſigned by him: and there follows a ſpecial clauſe of *Novodamus*, with reſpect to ſome particular lands; and after this a general clauſe of *Novodamus*, and an erection of the whole lands and patronages contained in the charter into one barony.

There did not appear evidence of any act of poſſeſſion of this right of patronage by the family of *Herries*; and Mr *James Guthrie*, the laſt miniſter of this pariſh, who was ſettled upon a popular call in the year 1694, having lived down to the year 1756, no poſſeſſion *could* be had for ſixty years paſt.

Pleaded in defence for the crown, That as his Majeſty is preſumed to have right to every patronage where no other right appears, ſo the charter 1510 conveyed no valid or effectual right to this patronage, being only a ſimple charter of reſignation, giving back to *Andrew* Lord *Herries* what he was pleaſed, in the procuratory of reſignation, to alledge had formerly belonged to him; and therefore could give to the reſigner no better right than he formerly had; becauſe theſe charters paſſing without inquiry, *periculo petentium*, do not, it is certain, beſtow any right, unleſs the crown had formerly granted the ſame; which is not proved to have been the caſe here.

2*do*, The clauſe of *Novodamus* in the ſaid charter 1510 does not extend to the patronage in queſtion, ſo as to be held equal to an original grant of the patronage. The charter contains only a ſpecial *Novodamus* of ſome particular lands: and the words *de novo damus*, thrown into the next clauſe, by which a new union of all the lands in the charter is made, has plainly been inſerted through inaccuracy, and without intending to confer any new right, other than the new erection into a barony; as is apparent from comparing the ſeveral clauſes and circumſtances of the charter.

3*tio*, The right of this patronage appears to have been veſted in the Archbiſhop

Archbiſhop of *Glaſgow*, who did accordingly exerciſe his right by preſenting to the benefice; as is proved by a decree obtained before the commiſſary of *Dumfries* in the 1671, by Mr *Lawſon* miniſter of the pariſh, againſt the heritors; wherein he ſets forth, as the foundation of his libel, That he had been ſettled miniſter in the ſaid pariſh in the 1668, upon a preſentation by the Archbiſhop, containing collation and inſtitution. The evidence ariſing from this decreet muſt be held good *in re tam antiqua*, and is ſufficient to eſtabliſh at once the right of the Archbiſhop to this patronage, and his exerciſe of it; and as the crown is now in the right of the Archbiſhop, the defenders are intitled to plead the poſitive preſcription upon the crown's right, and the negative preſcription of the purſuer's pretended grant, upon which no poſſeſſion appears to have ever followed.

Anſwered for the purſuer: To the *firſt*, It is impoſſible to produce the original grants of this eſtate, and patronage; becauſe they run back to a period long before we had any records: but there are ſeveral charters granted to the family of *Herries* previous to the year 1510, which are referred to, and which contain the patronages of the kirks within the barony of *Terregles*: and therefore the charter 1510, by granting *nominatim*, to *Andrew* Lord *Herries*, the patronage of *Irongray*, did truly give no more than formerly belonged to him. And the long ſeries of charters condeſcended on by the purſuer, are fully ſufficient to eſtabliſh his right in a competition with the crown, where no ſhadow of title in favour of any other perſon is produced.

To the *ſecond*, The charter 1510 contains a proper general clauſe of *Novodamus* of the whole lands, baronies, and patronages, contained in the diſpoſitive clauſe of the charter; and which clauſe, by its eſtabliſhed effect and conſtruction in law, muſt ſupply all defects in the former titles of the reſigner, being equivalent to a new grant. There is nothing inconſiſtent in granting, in the ſame clauſe, a *Novodamus* of the lands, and an union and erection of theſe lands into a barony; and an inſtance exactly ſimilar occurs in a grant to the Lord *Home*, which is produced.

To the *third*, The defenders do not pretend to point out or alledge any charter or other title to the patronage in queſtion in favour of the Archbiſhop of *Glaſgow*. And the only evidence ariſing from the decreet of the commiſſary founded on, is, that, in the year 1668, the Archbiſhop did take upon him to *nominate* and *collate* Mr *Lawſon* to this pariſh. There is no mention in the decreet, either of *patronage* or *preſentation*; and this letter of admiſſion and collation has probably been granted by the Biſhop, not as *patron*, but as having right to *nominate*, *admit*, and *receive*, *tanquam jure devoluto*. At any rate, it can never be maintained, that one ſingle act of poſſeſſion aſſumed by the Archbiſhop in 1668, is ſufficient to prove, that the right was in him, contrary to the evidence of a ſeries of charters from the crown, by which it appears that this patronage was veſted in the family of *Herries*. With regard to the pretended preſcription, there can be no foundation for it in this caſe. It is a fixed rule in law, That the poſitive preſcription cannot take place without a title; nor could the Archbiſhop's uſurping the poſſeſſion for one vice, eſtabliſh his right to the patronage, although his preſentee had enjoyed the benefice for any length of time, even beyond the years of preſcription. And as to the negative preſcription,

tion, nothing is more certain, in the law of *Scotland*, than that a right of property once veſted in any perſon, cannot be loſt by mere neglect of poſſeſſion, unleſs ſome other perſon has, at the ſame time, acquired that property; which cannot be pretended in the preſent caſe.

" The Lords found, " That the clauſe of *Novodamus* in the charter " 1510, contained a new grant of the patronage in queſtion; " and that the Archbiſhop of *Glaſgow*'s right to the ſaid patron- " age was not ſufficiently inſtructed by the decreet before the com- " miſſary of *Dumfries* in the 1671, nor by the poſſeſſion that fol- " lowed upon the preſentation mentioned in the ſaid decreet; and " therefore preferred the purſuer to the ſaid patronage." G. C.

Act. *Miller, Ferguſon.* Alt. Crown-lawyers. Clerk, *Kirkpatrick.*

N° CXII. 28th *June* 1758.

RONALD CRAWFURD writer to the ſignet,

AGAINST

ROBERT MAXWELL and his CREDITORS.

A bankrupt tenant having a tack to him and his ſubtenants, ſecluding aſſignees, may effectually ſubſet his whole poſſeſſion, if the ſubtenant find ſecurity for the rent payable to the maſter.

John Hay writer to the ſignet, in 1745, granted a tack to *Robert Maxwell, his heirs and ſubtenants, ſecluding his aſſignees*, of two incloſures, part of his lands of *Coatfield, alias Reſtalrig*, for nineteen years, commencing at *Chriſtmas* 1745, at the yearly rent of *L.* 122, 10*s. Sterling*; under a condition, that the lands let ſhould be kept in graſs, and uſed for paſture allenarly, excepting the firſt three years, when he was allowed to cut them for hay.

Thoſe lands became afterwards forfeited to his Majeſty, by the attainder of *John Hay*; and were, in 1753, purchaſed from the barons of exchequer by *Ronald Crawfurd*.

Robert Maxwell the tenant, ſoon after Mr *Crawfurd*'s entry, became inſolvent. He was in arrear of rent to Mr *Crawfurd*; and as he could hardly expect to find caution for ſo conſiderable a tack-duty, he was in danger of being removed. But in *January* 1754, matters were accommodated between the maſter and tenant. *Maxwell* granted an obligation to Mr *Crawfurd*, reciting, That his affairs had fallen into diſorder, and that his corns and cattle had been ſequeſtrated; but that " Mr *Crawfurd* had *allowed* him to poſſeſs the ſaid lands from *Chriſt-* " *mas* 1753 to *Chriſtmas* 1755, on his granting the ſecurity underwrit- " ten; therefore he, and *John Pringle*, as cautioner for him, bound " and obliged them to pay the rent for the ſaid two years:" and alſo to ſow up the ground with the crop, and lay it down in graſs in a proper manner.

After theſe two years were elapſed, *Maxwell* continued in poſſeſſion as formerly, till the end of the 1757; when being impriſoned for debt, he

he obtained a decreet of *ceſſio bonorum*, after granting a diſpoſition to his creditors of his whole effects; by which he, *inter alia*, " aſſigned, " from him and his heirs, *&c.* to and in favour of his creditors, the " aforeſaid tack granted to him by *John Hay*."

Afterwards the creditors finding, that *Maxwell* had no power to aſſign his tack, obtained from him, on the 16th of *January* 1758, a ſubtack to *Alexander Macdougal*, (a truſtee for the creditors); whereby he *ſubſet* to him, his heirs and ſubtenants, his whole poſſeſſion during the remaining years of the principal tack, for payment to *Maxwell* of the yearly rent therein ſtipulated.

Upon Mr *Crawfurd*'s application, *Maxwell*'s aſſignment of his tack to his creditors was ordered to be ſtruck out of his judicial diſpoſition *omnium bonorum*, in reſpect that, by the tenor of the tack, it was not aſſignable: but Mr *Crawfurd*, at the ſame time inſiſting in a removing againſt *Maxwell*, he, and his ſubtenant Mr *Macdougal*, and the other creditors, oppoſed the ſame, upon the ground of the ſubtack's being an effectual right to the poſſeſſion of the lands.

Pleaded for Mr *Crawfurd*, 1*mo*, *Maxwell* having aſſigned the tack in favour of his creditors, together with his whole ſtocking, and they having accepted thereof, *Maxwell* was thereby denuded both of the right and poſſeſſion; and as that aſſignment was contrary to the prohibition of the tack, and ſo found void and null, *Maxwell*'s right in the tack was thereby at an end, and it was not in his power thereafter to grant a ſubtack; for if he was once denuded of the tack and poſſeſſion by the aſſignation, the right thereto could not return to him upon the avoidance of that aſſignment, at the ſuit of his maſter; — *Balfour*'s *Pract.* *p.* 205. § 130. and 140.; — *Craig*, *dieg.* 10. § 3.

2*do*, Suppoſing no aſſignment had been granted by *Maxwell* to his creditors; yet the ſubtack is void, in reſpect of its being of the whole poſſeſſion, and of *Maxwell*'s utter bankruptcy. — The contract of tack is ſtrictly perſonal, being founded on the confidence which the maſter has in the tenant, and his circumſtances; a power of ſubſetting therefore could only be meant to enable the tackſman to ſubſet little parts of the farm, he himſelf remaining the effective tenant; a total ſubſet being equivalent to an aſſignation, which is prohibited.

3*tio*, Where a power of ſubſetting is exerciſed, the contract between the maſter and tackſman ſtill ſubſiſts; and conſequently the latter muſt ſtill be in condition to perform the preſtations incumbent upon him by the tack; otherwiſe it muſt be diſſolved; as by the nature of all mutual contracts, the one party cannot continue bound, if the other is unable to perform. Now, *Maxwell* is not only utterly incapable to perform, but having obtained a *ceſſio*, or decreet of liberation, he is thereby exempted from all diligence and execution for implement of his obligations, except as to his future acquiſitions; which is ſuch a change upon the *ſtatus perſonæ* of the tackſman, as muſt neceſſarily diſſolve the contract or tack. And,

4*to*, The agreement between Mr *Crawfurd* and *Maxwell*, in *January* 1754, for two years poſſeſſion, which is therein acknowledged by *Maxwell* to have been *an allowance* upon the part of Mr *Crawfurd*, imported an implied renunciation of the former tack.

Anſwered for the defenders, 1*mo*, The aſſignation granted by *Maxwell* to his creditors was not a voluntary deed, but what he was conſidered

to be by law obliged to give, although it proved ineffectual in reſpect of the tenor of the tack. But as that aſſignment is now found to have been void, it follows, that the granter was not thereby diveſted of the right; and conſequently he might ſtill exerciſe the powers competent to him by the tack.

2*do*, The power of ſubſetting is unlimited by the tack itſelf; and therefore it cannot be reſtrained upon argument or implication.

3*tio*, Though the bankruptcy might be a ground of reducing a tack, or any other mutual contract, yet it does not void it *ipſo facto*: and neither can it be relevant to reduce the tack, when the maſter is nevertheleſs ſufficiently ſecured; which is the caſe here, as the defenders have ſtocked the farm, and are willing to find caution to the maſter for payment of the rents. When that is done, the maſter will be abſolutely ſecured; nor will there remain any ground in equity, more than in law, for depriving the lawful creditors of the tenant, of a right, which was the moſt beneficial part of his eſtate and property. And,

4*to*, The obligation granted by *Maxwell* to Mr *Crawfurd* in 1754, contained no renunciation of the ſubſiſting tack, but only reſpected a method of uſing the grounds, different from that ſtipulated in the tack. *Maxwell*'s being allowed to continue ſeveral years in poſſeſſion after expiry of the two years mentioned in that obligation, ſhows, that the tack was ſtill held to be ſubſiſting by both parties.

" The Lords ſuſtained the ſubtack granted to *Alexander Macdougal*, he " finding caution to *Ronald Crawfurd* for payment of the rent " during the tack." D. R.

Act. D. Roſs, T. Miller, J. Ferguſon. Alt. J. Montgomery.

N° CXIII. 30th *June* 1758.

PETER FERGUSON dyer in *Perth*,

AGAINST

DONALD MACPHERSON of *Breahochy*.

Indenture ſigned by one notary and three witneſſes.

IN *May* 1754, indentures were entered into between *Peter Ferguſon* on the one part, and *Malcolm Macpherſon*, " with the ſpecial advice " and conſent of *Donald Macpherſon* of *Breahochy*, and as taking bur- " den upon him for the ſaid *Malcolm*," on the other part. *Peter Ferguſon* thereby became bound to inſtruct *Malcalm Macpherſon* in his buſineſs of dying, and to maintain him at bed and board during his apprenticeſhip; and *Malcolm* became bound to ſerve his ſaid maſter for the ſpace of five years: — In caſe of the apprentice's abſenting, " he obli- " ged himſelf, either to pay 6*s*. 8*d*. *Scots*, or ſerve two days, for " every ſuch abſent day, after the expiry of the indenture;" and both parties became bound in the penalty of *L*. 10 *Sterling*, to be paid by the failer to the party willing to perform.

This indenture was teſted by three ſubſcribing witneſs, and was regularly

gularly ſigned by the maſter and cautioner; but a notary ſigned for the apprentice, as he could not write.

After ſerving near two years and a half, the apprentice deſerted, and the maſter charged the cautioner for implement, and for the penalty. The cautioner ſuſpended, on this ground, That the indenture was a writ of importance, in terms of the act 1579; and the apprentice having only ſigned by one notary, before three witneſſes, in place of two notaries and four witneſſes, required by the act, it is void and null.

Anſwered for the maſter, 1*mo*, This is not a writ of importance, in the ſenſe of the act, which reſpects obligations for payment of ſums of money; it is only an obligation *ad factum præſtandum*. There is no debt or ſum of money directly due by it, but only penalties or damages, which are conſequential of the non-performance. 2*do*, The indenture was homologated by the apprentice's entering to the buſineſs, and continuing at it for near half the time, during which, the maſter was at conſiderable expence upon him, and could reap no profit from his work. And, 3*tio*, The ſuſpender was bound as a principal party, *for himſelf, and as burden-taking, &c.*; and the indenture being properly ſigned by him and the maſter, it muſt be binding upon him; and muſt be ſo, even although he had only contracted as cautioner.

Replied for the ſuſpender, 1*mo*, The act extends to all obligations requiring writ *ex ſua natura:* The value of the apprentice's abſence for the remaining time of his indenture, at the rate of half a merk *per diem*, amounts to above *L.* 400 *Scots*, to which the penalty of *L.* 10 *Sterling* is to be added; ſo that it is evidently a writ of great importance, as being an obligation, from whence a claim ariſes for much more than *L.* 100 *Scots*. 2*do*, The apprentice's entering to ſervice cannot ſupply or take off the legal nullity. Homologation has been only allowed to have ſuch effect in the caſe of marriage-contracts, or where ſums contracted for have been paid; and that too only in ſo far as reſpects the principal parties who homologate, but not as to the intereſt of third parties or cautioners. Neither could the apprentice, by renouncing the objection competent to him, create an obligation on the cautioner, which did not before ſubſiſt.— And, 3*tio*, The ſuſpender is bound expreſsly as cautioner: he ſigns the indenture as cautioner, and he is charged as ſuch to ſatisfy the obligations contained in the indenture: his obligation, therefore, is merely acceſſory, and muſt fall with the principal; and ſuppoſing he had contracted as a principal, yet in mutual contracts all parties muſt be bound, or elſe all are free.

Obſerved on the bench, Objections on the heads of force or fraud may be properly taken off by acts of homologation; but where deeds labour under a legal nullity, it is contrary to the practice of all other nations, to ſuſtain payments as acts of homologation ſufficient to ſupport ſuch deeds.

2*do*, If a deed or obligation for upwards of *L.* 100 *Scots* is reſtricted in its effect to that ſum, it may be ſo far ſuſtained, though ſigned only by one notary.

" The Lords remitted the cauſe to the Lord Ordinary, to modify da-
" mages to the maſter, not exceeding *L.* 100 *Scots*." D. R.

Act. *Macintoſh*. Alt. Sir *Dav. Dalrymple*.

N° CXIV.

N° CXIV. 30th *June* 1758.

JAMES HAY,

AGAINST

LORD CHARLES HAY.

Service, whether neceſſary?——*Service as heir of proviſion in general.*

SIR *James Hay* of *Linplum*, in the year 1685, diſponed his eſtate of *Bara*, in his ſon *John Hay*'s contract of marriage, "to the ſaid *John* "*Hay*, and the heirs-male of the marriage; whom failing, to the heirs- "male of any other marriage; whom failing, to Sir *James Hay* him- "ſelf, and the heirs-male of his body; whom failing, to the heirs "whatſoever to be procreated of the ſaid *John Hay*'s body," *&c.*

The ſaid *John Hay* having died in the year 1686, leaving iſſue of the marriage one daughter *Margaret Hay*, Sir *James* re-entered to the poſſeſſion of the eſtate, in which no infeftment had been taken, either upon the procuratory of reſignation, or precept of ſeiſin, in the contract of marriage. Sir *James* made up no proper title as ſubſtitute to his ſon in the contract; but in the year 1699, he, with the concurrence of his ſon *Robert Hay*, executed a ſettlement of theſe lands, as well as of his other eſtate, in favour of himſelf in liferent, "and his "ſon *Robert*, and the heirs-male of his body, in fee; whom failing, to "the Marquis of *Tweeddale*," *&c.* After Sir *James*'s death, in the 1704, his ſon Sir *Robert* entered into poſſeſſion of the lands of *Bara*, and continued in it during his life, in virtue of his apparency, without making up any titles. In 1748, having no iſſue, he executed a ſettlement "to "himſelf and his ſiſter *Margaret*, in liferent, and to the ſecond ſon of "*John* Marquis of *Tweeddale*, and the heirs-male of his body, in fee; "whom failing, to the other younger ſons of the Marquis ſucceſſively, "and the heirs-male of their reſpective bodies; whom failing, to Lord "*Charles Hay*, immediate younger brother of the Marquis, and the "heirs-male of his body," *&c.*

The ſaid *Margaret Hay*, the only daughter of *John Hay*, who was married to Lord *William Hay*, upon the death of Sir *Robert*, in 1751, obtained herſelf ſerved and retoured heir of proviſion to her father in terms of the contract 1685, on the ſuppoſition that ſhe, as heir whatſoever of the body of the ſaid *John Hay*, was thereby intitled to the ſucceſſion of the lands of *Bara*, to which neither her grandfather Sir *James*, nor her uncle Sir *Robert*, had made up any titles; and who, conſequently, had no power, by their after ſettlements, to alter the deſtination made in her favour by the contract 1685: And having thus eſtabliſhed a title to the unexecuted procuratory and precept contained in the contract of marriage, ſhe expede an infeftment, and brought a proceſs of mails and duties againſt the tenants of the lands; and thereafter conveyed her right to her ſon *James Hay*, the purſuer.

In this proceſs compearance was made for Lord *Charles Hay*, who claimed

claimed under the ſettlement made by Sir *Robert* in the 1748, which, as well as the ſettlement made by Sir *James* in the 1699, he endeavoured to ſupport. And,

Pleaded, 1*mo*, That Sir *James Hay* by ſurviving his ſon *John*, had ſufficient right to the lands, as neareſt ſubſtitute by the contract 1685, without the neceſſity of a ſervice: That although the contract of marriage 1685 veſted a perſonal right to the lands in favour of *John Hay*, and the heirs thereby called; yet as this right was never completed by infeftment in his perſon, the conſequence was, that Sir *James* his father remained veſted in the *feudal right* of the whole eſtate, ſubject indeed to the perſonal right in favour of *John Hay* and his heirs of proviſion; but as that perſonal right devolved upon Sir *James* himſelf, as heir of proviſion upon the failure of *John* and his iſſue-male, it was thereby abſorbed in the *real and feudal right*, which had remained in Sir *James*; whereby he became both creditor and debtor in the perſonal obligation to provide the lands to the heirs called by the contract of marriage; and the procuratory and precept he had granted for carrying that obligation into execution returned upon himſelf, and could be of no uſe, becauſe he was before duly veſted and ſeiſed in the lands: ſo that the perſonal right which was in *John Hay* by the contract was extinguiſhed in the perſon of Sir *James*, *confuſione*; and the real right being freed of that burden, became a full and abſolute right of fee in Sir *James*: and there was no neceſſity for him to take up that perſonal right by a general ſervice, and paſs a ſecond infeftment thereon; becauſe this could never have eſtabliſhed his right more fully than the infeftment and feudal inveſtiture which was before in his perſon; and therefore any diſpoſition granted by him, whether gratuitous or onerous, muſt ſtand good, bcauſe he was unlimited fiar in poſſeſſion and enjoyment of the eſtate. And ſo this point was expreſsly determined in the caſe of *Johnſton* of *Elſiſhiels* in 1736; which judgment was affirmed in the houſe of Peers. The general and fixed principle upon which that caſe was judged, muſt alſo be deciſive of the preſent queſtion, *viz.* That where a perſon has it in his power to make up two or more titles to the ſame eſtate, he may eſtabliſh the right in his own perſon by any of thoſe titles he pleaſes; and no ſucceeding heir can quarrel his predeceſſor's having made up his title in that manner, or pretend to take up the ſeparate right or title to the eſtate which he had neglected. Now, although Sir *James Hay* could have made up his title to the perſonal right, which had been given to his ſon, by a general ſervice; yet as he did not chuſe that method, it cannot now be challenged, becauſe it was a privilege competent to him by law, either to complete his title upon the perſonal right, or to reſt upon his real right of fee, freed and diſincumbered of the perſonal right, which had returned to him. And the deciſions in the caſes of the Earl of *Kincardine*, and more lately of the creditors of *Eaſterfearn* in the year 1751, were governed by the ſame rules.

Anſwered for the purſuer, There is nothing better eſtabliſhed in the law of this country, than the method of tranſmitting rights from the dead to the living. The rules of tranſmiſſion apply, not only to real rights that are completed in a *feudal manner* by *infeftment* in the perſon of a defunct, but alſo to *perſonal rights* to lands which were not completed at the time of his deceaſe. A general ſervice is as neceſſary to eſtabliſh a title

to the one, as a ſpecial ſervice is to the other. It would be equally dangerous to infringe this fixed rule, or to admit the contrary maxim, *Mortuus ſaſit vivum*, in the one caſe as in the other. Theſe are fundamental principles of the law of *Scotland*, That no eſtate can tranſmit *ipſo jure*, from the dead to the living; and, That there muſt be a ſervice either ſpecial or general, or what is equivalent, *ſecundum ſubjectam materiam*, to transfer that right which was in the defunct to the perſon of the heir. An apparent heir has no right to the perſonal or real rights that were in his predeceſſor before he ſerves, more than if they belonged to a ſtranger. As a conveyance is neceſſary to tranſmit them from the one, a ſervice is equally neceſſary to tranſmit them from the other. It was upon this ſolid ground that the deciſion proceeded in the noted caſe of the Earl of *Dundonald:* and the principles eſtabliſhed by that ſolemn judgment apply directly to the preſent caſe, where the lands in queſtion were, by the contract 1685, conveyed to *John Hay* the ſon; and, failing him, to a certain ſeries of heirs; on whom therefore it was incumbent, as on all other heirs, to make up a title by ſervice. Sir *James Hay* was evidently denuded of the property or fee of theſe lands by the contract of marriage in favour of his ſon, which could never poſſibly reveſt in his perſon *ipſo facto* without a ſervice, which was neceſſary, in order to cognoſce the failure of the nearer heirs, and to connect the right of the ſurviving heir by evidence on record, or without ſome formal act of the law to take that eſtate out of the *hereditas jacens* of his ſon. It is impoſſible in law, that an heir apparent, by any title he can make up to lands, can repudiate, extinguiſh, or conſolidate an infeftment in the perſon of his predeceſſor, until he eſtabliſhes a right to it by ſervice. And upon the ſame principles, it is equally impoſſible, that he can repudiate or extinguiſh *confuſione* a perſonal right granted to his predeceſſor, without making up a title to it. The ſame defect applies in both caſes, that the right was not taken up by the apparent heir, and cannot be extinguiſhed or defeated by any deed of a party who never had it in his perſon. As therefore the right to theſe lands which was given to *John*, was never afterwards taken up by Sir *James*, it is plain he had no power to make a ſecond diſpoſition thereof, to the prejudice of the purſuer's mother, who has now eſtabliſhed the only proper and complete title to theſe lands by her ſervice and infeftment.

The deciſion in the caſe of *Elſiſhiells*, founded on by the defender, does not apply, and is different from the preſent caſe in many particulars. Nor was it any way intended, by the judgment given in that caſe, to reverſe the principles eſtabliſhed in that of *Dundonald*; as is clear from an after judgment of the court, pronounced in a queſtion between the ſame parties, 29th *July* 1743. And in other caſes, the ſame principles have uniformly taken place; *January* 18. 1742, *Menzies* of *Coulterallers*; and *February* 23. 1757, *Porteous* of *Carmacoup contra Bell* of *Crurie*.

" The Lords found, That a general ſervice of Sir *James Hay*, as heir " to his ſon *John*, was neceſſary for properly veſting the right of " the lands of *Bara* in Sir *James*, and to impower Sir *James* to " convey theſe lands to his ſon Sir *Robert*, by the ſettlement " 1699."

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In the *next* place, it was *pleaded* for the defender, That ſuppoſing it ſhould be held to have been neceſſary for Sir *James Hay* to have ſerved heir of proviſion in general to his ſon *John*, in order to veſt in him a proper title to the perſonal right of the contract of marriage, he had accordingly complied with that form, and had obtained himſelf ſerved and retoured heir of tailzie and proviſion to his ſon *John*; as appears from the retour of his ſervice before the bailies of the *Canongate*, dated 10th *February* 1694, produced in proceſs. The words of the retour are, " Qui jurati dicunt, quod quondam Joannes Hay de Linplum, " filius natu maximus Domini Jacobi Hay de Linplum, Militis Baro- " netti, latoris præſentium, obiit ad fidem et pacem S. D. N. Regis; " et quod dictus Dominus Jacobus Hay eſt legitimus et propinquior " heres talliæ et proviſionis ejuſdem quondam Joannis Hay, ſui filii; " et quod eſt legitimæ ætatis. In cujus rei teſtimonium," *&c.*

Objected by the purſuer to this ſervice, That the retour had no relation to the contract of marriage 1685, nor to any of the ſubjects therein contained; and therefore could not be a title to the deſtination in that contract, nor be any evidence, that the jury had cognoſced the failure of the intermediate heirs, who were called to the ſucceſſion in virtue thereof: And that, *in reſpect of uncertainty*, it could not import a cognition of Sir *James Hay*'s being heir of proviſion to his ſon in this particular eſtate, or by virtue of this particular deed of ſettlement.

And in ſupport of this objection, it was *pleaded*, That a ſervice of one as heir of tailzie and proviſion in general, was abſurd and anomalous. The law knows of no ſuch general character of heirs; nor did ever any man make a deſtination to heirs of proviſion in general. The general heirs of line, of conqueſt, and heirs-male, point out clearly, by their ſervices, what rights they intend to take, *viz.* all rights deſtined to theſe reſpective characters of heirs, of each of which there can be but one; but a general heir of proviſion, a character unknown in the law, is ſo uncertain, that it is impoſſible to determine what rights are taken, or intended to be taken, by ſuch a ſervice. An heir of proviſion can exiſt only by his connection with the particular ſubject which is provided to him; and his ſervice ought to be a complete deed in itſelf, ſo as preciſely to determine the particular ſucceſſion intended to be taken by it, and to certify, that the party ſerved was called to the ſucceſſion by a ſpecial deed, and that all the preceding heirs were extinct. In the preſent caſe, neither the ſubject to which, nor the deed by which Sir *James* was to ſucceed, are mentioned; and there may have been twenty different deeds under which Sir *James* was called to ſucceed to his ſon, and as many ſeparate ſubjects in which that ſucceſſion might have taken place. The method therefore which has been followed in expeding theſe ſervices, for theſe fifty years paſt, has been, by referring to the particular ſubject which is intended to be carried, or to the particular deed containing the proviſion; agreeable to the opinion laid down by Lord *Stair*, *tit. Succeſſion*, § 33. And on theſe principles the court determined a ſimilar caſe, 21ſt *July* 1738, *Edgar contra Maxwell*, *Dictionary of Deciſions*, *tit. Repreſentation*. And although it appears, from a ſearch into the records of chancery, that there are a great number of retours, eſpecially in former times, preciſely in the ſame terms with the one now under challenge; yet it will not follow from thence, that the blunders of negligent or ignorant people ſhould get the better of the law, and form a rule to deſtroy the law. Uniform inveterate cuſtom

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may make law in many caſes; but ſuch erroneous ſervices are neither ſupported by the general practice, nor conformable to the principles of law; and therefore ought to be held as errors and deviations from the right path, and as ſuch to be ſet aſide.

Anſwered for the defender, 1*mo*, The retour in queſtion is agreeable to the general practice of the time when it was made; and the rights of the ſubjects founded upon conſuetude, even though erroneous, ought not to be cut down, *poſt tantum temporis*, upon new opinions, or abſtract notions of the principles of law. It appears from a ſearch into the records, that, previous to the year 1704, there are no leſs than 185 general ſervices of heirs of tailzie and proviſion, which do not refer to any particular deed; and there is alſo a conſiderable number in the ſame terms ſince that period: and although a contrary practice has generally prevailed of late years, yet that alteration in the practice can be no juſt ground for reducing ſo many prior ſervices, which were expeded according to the general and received opinion of the nation at the time. A deciſion of that kind might have very fatal conſequences to a great part of the property of the nation. 2*do*, The retour, in this caſe, affords ſufficient legal evidence, that a deed of proviſion was produced before the jury, which proved, that Sir *James Hay*, the claimer, was neareſt heir of tailzie and proviſion to his ſon *John*; and the objection of uncertainty is fully obviated by production of the contract 1685, which ſhows his real title to that character: and as no other deed, by which Sir *James* could be ſerved heir of tailzie and proviſion to his ſon, is alledged or ſpecified by the purſuer, the preſumption of law and reaſon is, that this contract of marriage was the deed upon which the jury returned their verdict. The principal ſervice, as ſigned by the chancellor, is alſo produced in proceſs, and appears to be in the ſame terms with the retour; but there is ſubjoined to it the following words, alſo ſigned: " Whereupon Mr *James Brown* writer in *Edinburgh*, " as procurator for the party, *by virtue of the contract of marriage be-* " *twixt John Hay younger of Linplum and Mrs Jean Foulis, dated 4th* " *July* 1685, takes inſtruments," *&c.* Theſe words, though inaccurately expreſſed, afford the moſt ſatisfying evidence, that the ſervice was *by virtue of the contract*, and proceeded upon production thereof before the inqueſt: and therefore, without ſuppoſing that the fifteen ſworn men of the inqueſt had perjured themſelves, and retoured falſely, or without evidence, it is impoſſible to imagine, that the deed 1685 was not produced before the jury, and made the foundation of their verdict. 3*tio*, In the only inſtance in which this objection was moved to a retour in the ſame circumſtances, it was almoſt unanimouſly over-ruled by the court, in the caſe of Major *Forbes contra* Mrs *Jean Maitland* of *Pitrichie* in 1752; and that judgment was affirmed by the houſe of Peers.

" The Lords ſuſtained the ſervice of Sir *James Hay*, as heir of tailzie " and proviſion to his ſon *John Hay*; and therefore ſuſtained the " titles in the perſon of Lord *Charles Hay*, and preferred him to " the mails and duties of the lands of *Bara*." G. C.

Act. A. Pringle, Lockhart, Ferguſon. Alt. *Miller, R. Dundas.* Clerk, *Gibſon.*

N° CXV.

N° CXV. 4th *July* 1758.

JAMES BURNS,

AGAINST

ARCHIBALD PICKENS.

An onerous purchaſe from an apparent heir three years in poſſeſſion, cannot be defeated by an adjudication upon a gratuitous bond of a ſecond apparent heir, though deduced for behoof of the gratuitous creditor in the bond, and not of the ſecond apparent heir.

James Knox, when apparent heir to his father *John* ſold ſeveral ſubjects in which *John* had been infeft, but in which he himſelf was not infeft. He lived more than three years after the ſales ſo made by him. One of theſe ſubjects came into the hands of *Archibald Pickens*.

George Knox, the brother of *James*, granted a gratuitous bond to *James Burns*, to be the foundation of an adjudication of theſe ſubjects, for the behoof of *Burns*; and accordingly *Burns* obtained adjudication againſt *George*, as charged to enter heir to his father *John* in theſe ſubjects; and upon that title brought a reduction of the above ſales againſt the ſeveral poſſeſſors; and among others againſt *Pickens*.

The ground of the reduction was, That the ſales had been made by an apparent heir; and therefore flowed *a non habente poteſtatem*. The *defence* for *Pickens* was, That as *James Knox*, the apparent heir, had been three years in poſſeſſion, *George Knox*, the next apparent heir of *James*, was therefore bound by his onerous deeds; and *Burns*, on a gratuitous bond from *George*, could not quarrel thoſe ſales which *George* himſelf could not quarrel.

The abſtract queſtion came therefore to be, Whether an onerous purchaſe from an apparent heir who had been three years in poſſeſſion, can be defeated by an adjudication upon a gratuitous bond of a ſubſequent apparent heir, deduced, not for his own behoof, but purpoſely to connect a title to the eſtate of his predeceſſor, for behoof of the gratuitous creditor in the bond.

Pleaded for *Burns*, At common law no man could ſell that heritage in which he was not infeft. The ſtatute of 1695 corrected the Common law, and gave certain effects to deeds of apparent heirs in certain circumſtances: but in ſtatutes correctory of the Common law, courts of juſtice cannot extend their interpretation beyond the ſtrict words of the ſtatute; nor apply deciſions to caſes falling within the purview and reaſon of the ſtatute, if they fall not within the letter of it. Now, the alteration made on the Common law by the ſtatute of 1695 is, that when a ſecond apparent heir either ſerves himſelf heir, or by adjudication on his own bond ſucceeds to a remoter predeceſſor, he ſhall be liable to the debts and deeds of the interjected apparent heir who was three years in poſſeſſion of the lands with which he connects: but here *George* has not connected himſelf with the lands by a ſervice; for he is not ſerved at all: neither has he ſucceeded by an adjudication

on his own bond; for the bond granted by him is not for his own behoof, but for the behoof of *Burns*; and it is *Burns*, and not he, who is to ſucceed upon it.

Anſwered for *Pickens*, The ſtatute of 1695 was intended to correct the frauds of apparent heirs; but ſtatutes correctory of fraud are to be extended to every caſe falling within the purview and reaſon of them. In order to bind the ſecond apparent heir, or thoſe in his right, all that the ſtatute requires is, that the eſtate be taken out of the *hereditas jacens* by his act and deed, whether in the form of a ſervice or an adjudication. It is not the leſs true, that an heir takes the ſucceſſion out of the *hereditas jacens*, that he has thought fit to give it away to another, whether gratuitouſly, or for an onerous cauſe: even if he ſhould give it away before the titles are made up, that would not relieve him from the ſanction of the ſtatute. If the title is made up in conſequence of his deed, he muſt be liable at leaſt *in valorem* of the eſtate, which he has carried off from the *hereditas jacens* of his predeceſſor, whether he keeps it to himſelf, or diſpoſes of it to another.

Of this many inſtances may be figured, which cannot be diſputed to fall under the ſtatute. Suppoſe an apparent heir ſhould ſell the eſtate in which his grandfather died infeft, before he makes up titles, and after the purchaſer is infeft he makes up his titles by ſervice; or ſuppoſe the diſpoſition he had granted before the ſervice had been gratuitous: in either of theſe caſes it could not be doubted, that the heir would be liable to his father's debts, in terms of the ſtatute; though it might be alledged, with the ſame colour as in the preſent caſe, that the heir had not *cum effectu* ſucceeded to his grandfather's eſtate, as his ſervice truly gave him nothing; for that the moment it was expede, and completed by infeftment, the right accreſced to the purchaſer or gratuitous diſponee to whom he had before conveyed it.

Again, If in place of ſerving heir, the purchaſer ſhould chuſe the other method, to make up the title by charging him to enter to his grandfather, and adjudging upon the diſpoſition or obligation to infeft, there ſeems as little ground to doubt, that the heir would be liable in terms of the act, though he had choſen to part with the eſtate, in place of keeping it, and had made up the title in ſuch manner, that the lands ſhould immediately paſs over to the purchaſer, without remaining one moment with himſelf.

And if that would be the caſe, even where the title is made up by adjudication upon a diſpoſition, it applies, *a fortiori*, to the preſent caſe, where the adjudication is upon a bond. For though the title was directly veſted in *Burns*, to the extent of the ſum in the bond; yet as to the reverſion of the ſubjects adjudged over and above that ſum, the right was acquired to the heir, and not to the adjudger; and as the heir could not conteſt payment of the laſt poſſeſſor's debts, to the extent of the value of the reverſion which remained with him after adjudication; ſo a court will not ſuſtain it as a defence, againſt his being liable to the whole value of the lands, That he had given away a part, whether onerouſly or gratuitouſly, by the ſame deed by which he eſtabliſhed a title to the ſubject.

" The Lords found, That the purſuer cannot, on his gratuitous " bond, and adjudication following upon it, impugn the defend-

" er's

" er's rights flowing from *James Knox*, upon account of *James* " *Knox*'s not making up his titles, as *James* is admitted to have " been three years in poſſeſſion." J. D.

Act. *Lockhart.* Alt. *Fergusſon.*

Hearing in preſence.

N° CXVI. 6th *July* 1758.

ROBERT SYM truſtee for JACKSON's CREDITORS, AGAINST GEORGE THOMSON.

Deed by a Scots *bankrupt granted in* England *reduced.*

Jackſon, a conſiderable merchant in *Dalkeith*, had due to him in the north of *England* debts to the amount of above *L.* 800.

In *October* 1752, finding his circumſtances deſperate, he went, with *Thomſon*, one of his creditors, for a few days into the north of *England*; where he granted to *Thomſon* an aſſignment, in the *Engliſh* form, of the above debts; and then both returned together to *Scotland*.

Within ſixty days after this aſſignment, *Jackſon* became notour bankrupt, in terms of the law of *Scotland*.

Robert Sym, acting as truſtee for the other creditors of *Jackſon*, brought a reduction of this aſſignment, as granted fraudfully to their prejudice by *Jackſon*.

Pleaded for the truſtee for the creditors, The aſſignment was an offence and fraud at common law. When a man becomes bankrupt, equity points out, that his creditors ſhould all get their ſhares of his effects, according to the merits of their reſpective debts. The ſtatutes of bankruptcy in *England* bring in all creditors equally. The ſame is the law of *Holland* and *France*; and indeed of all commercial nations. The ſtatutes of *Scotland*, the acts of ſederunt, the deciſions of the court, have all, for a long time, been favouring the equality of creditors: but, in the preſent caſe, this equality has been broke, and a fraudful preference granted to one creditor to the prejudice of all the reſt.

2*do*, The aſſignment is reducible on the act 1696. That act proceeds on a narrative, " That notwithſtanding the acts of parliament already " made againſt fraudful alienations by bankrupts, in prejudice of their " creditors; yet their frauds and abuſes are ſtill very frequent." Here the narrative makes no diſtinction whether the fraudful alienation has been made in *Scotland*, or has been made in a foreign country: all it regards is, whether a fraud has been committed, and whether it can come under an act of parliament in *Scotland*. This ſtatute goes on, and enacts, or rather declares, " That all and whatſoever voluntary " diſpoſitions, aſſignations, or other deeds, which ſhall be found to " be made and granted, directly or indirectly, by the foreſaid dyvour " or bankrupt, either at or after his becoming bankrupt, or in the " ſpace of ſixty days before, in favour of his creditor, either for his " ſatisfaction

" ſatisfaction or further ſecurity, in preference to other creditors, to be " void and null." Here the ſtatute makes no diſtinction, whether the aſſignation by the bankrupt, to the prejudice of his creditors, be granted in *Scotland*, or granted in *England*. The only thing it inquires is, whether it was an aſſignation granted by a bankrupt in prejudice of his creditors? It ſaves no ſort of aſſignations, for it includes *all and whatſoever*, granted *directly or indirectly*; and declares them to be *void and null:* after which, a court cannot make that diſtinction which the ſtatute hath not made. It cannot ſave aſſignations, to the prejudice of creditors, granted by a bankrupt who has paſſed over the border for a little, when yet the ſtatute hath declared all and whatſoever aſſignations, and *granted directly or indirectly*, by ſuch a perſon, to ſuch purpoſes, to be void and null. In a ſtatute correctory of fraud, if courts chuſe to go beyond the letter of the ſtatute, it ought to be in the way of extenſion, and not of limitation. They ought to correct fraud, not to open a door to it; to aſſiſt the common law, not to ſhow the deficiencies of it; to void all fraudulent aſſignations, inſtead of ſupporting any upon a diſtinction not founded in the expreſs letter of the ſtatute.

And in this view, the reduction of the aſſignment in queſtion is founded, in the ſpirit, as well as the letter of the ſtatute. For as the ſtatute is intended to bar alienations granted by a bankrupt in prejudice of his creditors; ſo every caſe contrived to cover ſuch frauds, falls under the meaning and purview of the ſtatute. The caſe in hand would fall under the ſpirit of the ſtatute, even though the words of it had not been ſo expreſs as they are. Though the words *all and whatſoever, directly or indirectly*, had not been there, they ought to have been ſupplied by interpretation: and now that they are there, they cannot be frittered down by a contrary interpretation; they may be extended, but they cannot be limited.

3*tio*, The conſequences of a contrary doctrine, if eſtabliſhed, would be exceeding hurtful both to *Scotland* and *England:* it would open a door for infinite frauds to the bankrupts of both nations; who would then have nothing to do but to ſtep over the border, grant their fraudful preferences, as they pleaſed; and then, when they returned to their own country, they and their favoured creditors would be ſafe, and righteous creditors diſappointed.

There is no making a diſtinction betwixt the retroſpect of the ſtatute 1696, and the conſequence of it. For if the court ſhould find, that the retroſpect of it ſhould not have effect in the preſent caſe, then, upon the ſame principles, the firſt time the point came to be tried, it would be found, that the conſequence of the ſtatute could not bar a ſimilar aſſignment; the effect of which would be, to enable a bankrupt in *Scotland*, *after* he was declared to be a bankrupt, to grant in *England* fraudful aſſignments, ſimilar to the preſent one. The refuſing to give force to the retroſpect of the ſtatute, is but a ſtep to the refuſing to give force to the conſequence of it. The one muſt follow the other; and therefore, by the deciſion ſought by *Thomſon*, the act 1696 is not only to have no retroſpect as to fraudful aſſignments made out of the country, but is even to have no effect as to preferences out of the country, granted *after* the bankruptcy is aſcertained and notour: And, in conſequence of this, one having obtained a *ceſſio bonorum*, might, upon his getting out of priſon, go into *England*, and convey his effects, as

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he pleaſed, without thoſe to whom he granted his preferences being accountable therefor.

Anſwered for *Thomſon*, The equality of creditors is a mere ſpeculative point; it is but at beſt the concluſion of abſtract reaſoning. The *Roman* law preferred creditors according to the priority of their diligence; there can be no breach of morality in a creditor's getting payment of his fair debt the ſpeedieſt way or the moſt ſecret way that he can.

The words of the act 1696 are indeed general; but ſo are thoſe of all general laws; and it was never intended, that this law, though general in its effects in *Scotland*, ſhould have effect over debts due by perſons in *England*, and payable in *England*; nor is there any inſtance where a mere poſitive inſtitution, a retroſpect too, the creature of a ſtatute, and not of the common law, ſhould be the rule for deciding differences concerning ſuch debts.

" The Lords reduced the aſſignation, and remitted to the Lord Or-
" dinary to proceed accordingly." J. D.

Act. *J. Dalrymple, Brown, Lockhart.* Alt. *Geo. Pringle, A. Pringle, Advocatus.*

N° CXVII. 7th *July* 1758.

JAMES ROBERTSON writer in *Edinburgh*,

AGAINST

His MAJESTY's ADVOCATE.

Preſcription interrupted by the debtor's eſtate being annexed to the crown. —Date of a Britiſh *act of parliament.*

ALexander *Robertſon* of *Strowan*, in 1683, granted bond for 600 merks to Sir *William Paterſon*. This debt Sir *William* aſſigned to his ſon *John*, from whom the right to it came into the perſon of *James Robertſon*.

Alexander Robertſon of *Strowan*, the ſon and repreſentative of the debtor, was convicted of high treaſon, and forfeited by decree of the parliament of *Scotland*, dated 22d *July* 1690.

In 1703, *Strowan* obtained from Queen *Anne* a pardon, and gift of his eſtate, which was iſſued from the ſecretary's office, but not expede through the ſeals. He however entered to poſſeſſion of the eſtate, and ſued and defended in actions before all courts during the Queen's reign.

John Paterſon, then in the right of the aforeſaid debt, charged him to enter heir in general to his father, and thereupon raiſed a ſummons againſt *Strowan* on the paſſive titles; which was given out to ſee on the 27th *December* 1711, and returned 3d *January* and inrolled 5th *January* 1712, but no further ſtep taken in the action.

Strowan having engaged in the rebellion 1715, was again attainted by act of parliament. In 1723, King *George* I. was pleaſed to grant a revocable gift of the eſtate to *Strowan*'s ſiſter; and in 1725, a pardon was granted to him, ſo far only as concerned his life.

Strowan once more appeared in rebellion in 1745; and thereupon his

Majeſty revoked the gift that had been made to *Strowan*'s ſiſter, and reſumed the eſtate upon the forfeiture 1690.

In the 25th year of his Majeſty's reign, an act paſſed for annexing to the crown certain forfeited eſtates, which had been veſted in his Majeſty by a former act of the 20th of his reign. Theſe eſtates were by the ſtatute declared to be unalienably annexed to the crown, "from and after the 25th "day of *December* 1752." The act proceeds to provide for ſatisfaction to be made to the creditors on theſe eſtates; and then follows this clauſe: "And whereas the barony of *Strowan*, and other lands, which "formerly belonged to *Alexander Robertſon* of *Strowan*, now deceaſed, "became forfeited to the crown, by decree or ſentence of the par-"liament of *Scotland* in the year 1690, and now belong to and remain "the property of his Majeſty, be it further enacted, by the authority "aforeſaid, That the ſaid barony and lands *be, and are hereby annexed* "to the imperial crown of this realm, and ſhall be and remain for "ever unalienable from the ſame; and the lawful debts thereon ſhall "be paid in the ſame manner as is provided concerning the lands and "premiſſes before mentioned."

In the 26th of his Majeſty, another ſtatute paſſed, directing the lawful creditors on the ſaid eſtate of *Strowan*, before the 1ſt of *December* 1753, to enter their claims in the court of ſeſſion, there to be tried in the manner preſcribed as to claims on other forfeited eſtates, by the veſting act of the 20th of his Majeſty.

James Robertſon accordingly entered his claim for the aforeſaid debt before the 1ſt *December* 1753.

Objected for the crown, The debt is cut off by the negative preſcription, no legal document having been taken upon it from the date of the bond in 1683.—The ſummons 1711 could not interrupt the preſcription; becauſe it was raiſed againſt *Strowan* only, who had not a *perſona ſtandi*, but was dead in law, his pardon never having been expede, and the eſtate was ſtill in the crown.

Anſwered for the claimant, The negative preſcription is founded in the preſumed dereliction of the creditor. An interruption of it is only neceſſary to ſhow the *animus* of the creditor to proſecute his claim. Here the law does not ſo much conſider the real ſituation of the parties, as the apparent ſtate they are underſtood to be in at the time. *Strowan* was then univerſally believed to have been effectually reſtored againſt the forfeiture 1690; and it was ſo underſtood by the legiſlature itſelf, when the ſecond attainder was paſſed againſt him in 1715; and many other actions were in the Queen's time proſecuted by him, or carried on againſt him even in the Houſe of Peers. Suppoſing the defect of completing the pardon had been known or attended to at the time, and that it was liable to revocation, or might fall by the death of the granter; yet, while *Strowan* enjoyed the benefit of it, and continued in poſſeſſion of his eſtate, it was not competent for him to object againſt being made liable in payment of the debt; and it has been found, that an attainted man is liable to perform his contracts, and that diligence may iſſue againſt him for that purpoſe, 24th *December* 1725, *Jacob Gomes Serra contra Robert* late Earl of *Carnwath*. Now, a proceſs againſt a party who might have been found liable in payment, is ſurely a ſufficient interruption of the negative preſcription.

Replied,

Replied, The debt purſued on is not contracted by the attainted perſon, but by his father; ſo the deciſion quoted does not apply.

The Lords were of opinion, that the proceſs 1712 was ſufficient to interrupt preſcription.

But it was further *objected* for the crown, That the years of preſcription were run from the 5th of *January* 1712, when the laſt ſtep of that proceſs was taken, to the 5th of *January* 1752, which was before Mr *Robertſon*'s claim was entered.

Pleaded for the claimant, The only method competent for the creditors of *Strowan* to recover payment of their debts, before the ſtatute of the 26th of the King, was to attach the eſtate by *real* action or adjudication, in purſuance of the act 1690. But as, by the act of the 25th of the King, this eſtate was *annexed unalienably* to the crown while the term of forty years from the interruption 1712 was yet current, the claimant was thereby *non valens agere*, as the eſtate could not be thereafter adjudged, and he could do nothing for recovery of his debt till the ſtatute of the 26th appointed the method of entering claims in this court, which he followed in due time.

Anſwered for the crown, 1*mo*, The act of the 25th of the King annexed this eſtate "in the ſame manner" with the other forfeited eſtates therein mentioned, that is, only from the 25th *December* 1752, which was after the forty years were expired.—2*do*, Suppoſing the ſtatute to have immediately annexed this eſtate; yet on the 5th of *January* 1752, when the forty years expired, the ſtatute did not exiſt; it was only firſt moved upon the 17th *February* 1752, and got the royal aſſent on the laſt day of that ſeſſion, which was the 26th *March* 1752.—And, 3*tio*, Although the annexation had been made within the years of preſcription; yet the claimant was *valens agere* during the whole forty years, as he might ſtill have brought a declarator for having it found, that his debt was lawful, and ſubſiſting to ſuch an extent; and that in terms of the annexing act, he was intitled to recover payment of it.

Replied for the claimant, 1*mo*, The clauſe of the annexing act relative to this eſtate annexes it to the crown *de præſenti*, without mention of any future day; and the reference to the caſe of the other eſtates only concerns the payment of debts. 2*do*, The *Britiſh* ſtatutes do not bear dates, like the *Scots* acts; but it is an eſtabliſhed rule of the law of *England*, That every ſtatute is held to be paſſed on the firſt day of the ſeſſion in which it is made; and if no time is expreſſed in the ſtatute, from which it ſhould take effect, it muſt operate *retro* from the firſt day of the ſeſſion; *Lo. Coke*, 4. *Inſt. p.* 25.; *Brook's Abridg. tit. Relation*, § 34.—Now, this ſeſſion began on the 14th of *November* 1751, which was near two months before the forty years expired. And although, in fact, the act was not paſſed till ſome time after; yet no man can loſe his right through preſcription, by neglecting to do what, by a ſupervenient ſtatute, would have been rendered uſeleſs. And, 3*tio*, The only effectual method for recovering payment preſcribed by the act 1690, was an adjudication, which confeſſedly could not be led after annexation. It is alſo at beſt doubtful, if a declarator would have been competent after it: but, at any rate, as neither payment nor ſecurity could have been got by it, the creditor was not bound to bring ſo unprofitable an action.

"The Lords found, That the preſcription objected to the debt

"claimed

" claimed on was ſufficiently interrupted; and therefore ſuſtained " the claim." D. R.

Act. *Dav. Rae, J. Ferguſon.* Alt. The Crown Lawyers. Reporter, *Kaims.*

N° CXVIII. 8th *July* 1758.

Hearing in preſence.

JOHN GRANT,

AGAINST

THOMAS FORBES.

Surety for meſſenger liable for malverſations done to thoſe againſt whom meſſenger is employed. — Liable for meſſenger in expences of proceſs. — Not free though commiſſion not recorded. — Nor though Lion dead at time of malverſation.

John Grant became cautioner for *John Henderſon*, a meſſenger, to the Lord Lion, in the following words: " I *John Grant* the younger of " *Rothmaiſe*, by the tenor hereof, bind and oblige me, my heirs, " executors, and ſucceſſors, as cautioner and ſurety for *John Henderſon* " in *Giach*, to the Honourable *Alexander Brodie* of *Brodie*, Eſq; Lion " King of Arms, that the ſaid *John Henderſon*, where he ſhall dwell " and remain, ſhall leally, truly, and honeſtly uſe and exerce the " office of a meſſenger, to all and ſundry our Sovereign Lord's lieges, " upon their reaſonable expences: And if he does in the contrary, " what damages, ſkaith, or expences, any of them ſhall happen to " ſuſtain through the negligent, fraudful, and informal execution of " the ſaid meſſenger in the ſaid office, we bind and oblige us, conjunct- " ly and ſeverally, both cautioner and meſſenger, to pay the ſame to " the party intereſted and wronged."

The commiſſion from the Lord Lion to *Henderſon* was clogged, as all commiſſions to meſſengers are, with the following clauſe: " And I " (*i. e.* the Lord Lion) ordain theſe preſents to be regiſtered in my " court-books, within eight days next after the date hereof, otherwiſe " to be null." But *Henderſon*'s commiſſion was never regiſtered in theſe books.

Further, the bail-bond was taken to the late Lord Lion alone, and not to his ſucceſſors in office, and *Henderſon* never renewed his commiſſion with the preſent Lord Lion.

Afterwards *Henderſon* was guilty, in concurrence with ſeveral others, of a very violent abduction, oppreſſion, and extortion againſt *Thomas Forbes*.

Forbes having purſued *Henderſon* and his accomplices for theſe criminal acts, made *John Grant* likewiſe defendent in the ſuit, not as an accomplice, but as cautioner for *Henderſon* the meſſenger.

John Grant's *defence* was, That though he, as ſurety, was bound to all perſons employing *Henderſon*, that *Henderſon* ſhould ſerve them faithfully; yet he was not bound to thoſe againſt whom *Henderſon* was employed,

ployed, to make reparation to them for all the miſdeeds and outrages which *Henderſon* might commit againſt them.—That there was a good reaſon to take ſurety for the ſake of the employers, to wit, that there were but few meſſengers, and if theſe refuſed the employment of any one, no other perſon could do the office; but that it was not the genius of the *Britiſh* law, or of any law, to demand ſurety for a perſon that he ſhould not do miſchief.—That the act. 46. parl. 1587, which gave riſe to the taking bail-bonds in *Scotland* from meſſengers, ordained, "That every perſon ſo admitted of new, (*i. e.* into the office of "meſſenger), ſall find guid and reſponſible ſovertys for obſervation of "the injunctiones conteined in the end of this preſent act, to our Sove-"reign Lord's uſe, with coſtes, ſkaithes, dammages, and intereſt of "parties greeved, be the *falſehood*, *negligence*, or *informality* of any of-"ficer:" from which it appeared, that the ſurety the law demanded was only to protect from the *falſehood*, *negligence*, or *informality*, of officers, all of which might create an injury to the employer, but could create none to the party againſt whom the employment was directed: That when the injunctions to meſſengers referred to in this ſtatute are looked into, it appears there are none of them which reſpect abuſe or oppreſſion upon a perſon againſt whom diligence was to be executed; they are entirely confined to certain regulations intended for enabling meſſengers, with the greater certainty, to do their duty to their employers.—That the 73d act of the ſame parliament enacts, "That "none be retained, or hereafter remitted to that ſervice, but he "that with his utheris injunctiones ſall find ſoverty to be always "furniſhed with a ſufficient ready horſe, quhairupon to ſerve his "Highneſs and leidges; and that his ſoverty ſall be anſwerable for the "dammage and intereſt of his *falſehood*, *ſlouth*, and *informal doing*, in "his Hieneſs ſervice, or uther parties, gif any ſall happen:" from which it appears ſtill further, that the law required ſurety only for the damage occaſioned by the *falſehood*, *ſlouth*, *i. e.* negligence and *informality* of the meſſenger.—That in other ſtatutes, particularly the 84th act of the ſame parliament, due and ſeparate proviſions are made for the ſecurity of thoſe againſt whom the meſſenger may commit abuſe or oppreſſion. By this act it is enacted, "That officiares of armes "committand falſed or oppreſſions of the leidges, in execution of their "office, ſall be called therefor before the juſtice or his deputy, or "juſtice-aires, or particular diettes, and puniſhed to death in caſe they "be found culpable."—That the bail-bond goes exactly upon this plan, and follows the very words of the ſtatutes: it obliges the ſurety "to "pay what damage, *&c.* any of the lieges ſhall ſuſtain through the "*negligent*, *fraudful*, and *informal* execution," *&c.*; and obliges the ſurety that the meſſenger ſhall exerce his office to the lieges upon *their reaſonable expences*; which laſt words ſhow, that the ſurety was found for the ſake of the employer, and not for the ſake of the perſon againſt whom the employment was directed; ſeeing, by the law of *Scotland*, the meſſenger was paid his expences by the perſon who employed, and not by the perſon againſt whom he was employed.

It was *anſwered* for Mr *Forbes*, That as meſſengers were inveſted with powers which no one durſt reſiſt, the law was doubly attentive to protect the ſubjects from the abuſe of thoſe powers; and as greater oppreſſions could be committed by meſſengers againſt thoſe whom they

were employed to ſeize, than againſt thoſe who employed them, it was abſurd to limit the ſurety found to theſe laſt.—That the words *falſehood*, *ſlouth*, and *informality*, muſt be explained by the ſpirit of the law, which intended to ſecure the ſubject againſt every malverſation; and if the two ſtatutes of the year 1587 were explained by the ſtrict meaning of their words, ſuch manner of interpretation would tend to explain away theſe, and many more of our old ſtatutes, which are worded ſo as to explain the intendment and ſpirit of them, but not to enumerate every poſſible caſe falling under them.—That the act 212. 1594, "ordained all the ſaids officiars that has found not ſufficient caution "for *due adminiſtration in their office*, or where cautioners are deceaſed, "or are not ſufficient, to find caution of new, betwixt and the 1ſt "day of *Auguſt* next to come; otherwiſe the not finding of the ſaid "caution is preſently declared to be the cauſe of their deprivation; "whilk deprivation ſall be immediately publiſhed at the market-croſs "of the ſheriffdomes where the ſaid officiars remains." Here the act, referring to the former ones, makes uſe of the general words, *undue adminiſtration*, which ſhows, that the whole ſubjects were to be protected by the caution found.—— Sir *George Mackenzie*, in his Criminals, title, *Deforcement*, ſays, "If a meſſenger do any wrong in the execution of his "office, he is liable therefor *ad damnum et intereſſe*, and finds caution "for that effect to the Lion at his entry." And in his obſervation upon the 73d act, 1587, he ſays, "Meſſengers find caution to the Lion at "their admiſſion *de fideli adminiſtratione*;" ſhowing thereby his opinion, tha the obligation of the ſurety was general, as the purſuer contends, nottlimited, as the defender contends.

"The Lords found *John Grant* the cautioner, conjunctly and ſeverally "with *Henderſon*, liable in damages to *Forbes*, and likewiſe in "*Forbes*'s expences of proceſs againſt both *Henderſon* and *John* "*Grant*."

In reclaiming againſt this interlocutor, *John Grant contended*, with regard to his being made liable in the coſts of ſuit, which had been incurred in purſuing *Henderſon*, That ſuppoſing him, as ſurety, liable for the damage occaſioned by the meſſenger; yet he could not be liable for the expence of proceſs in aſcertaining that damage, unleſs it had been expreſsly provided for in the obligation; that no ſurety can be liable till the debt is liquidated againſt his principal, and the only proof of that debt is an extracted decree; that in that event he is indeed liable in the debt itſelf, for which he had bound himſelf; but not for the expence of proving that debt, for which he had not bound himſelf.

It was *anſwered* for *Forbes*, That the words of the bail-bond extend to all *damage*, *ſkaith*, *or expences*, *any of the lieges ſhould ſuſtain*; and therefore muſt comprehend the expence incurred by the party in aſcertaining the damage he has ſuffered.

"The Lords adhered."

Separatim, it had been *objected* by *John Grant*, 1*mo*, That as the late Lord Lion's commiſſion to *Henderſon* was granted under a condition, that the commiſſion ſhould be regiſtered in the lion-court books within eight days of the date of it, which condition *Henderſon* had never fulfilled, the commiſſion in itſelf was void; and therefore that *John Grant*, who

who was only ſurety on the ſuppoſition that *Henderſon* was a meſſenger, was free, and no ſurety, when it appeared that *Henderſon* was no meſſenger.

Anſwered for *Forbes*, That whatever nullity there might be in the commiſſion; yet *Henderſon* had acted as meſſenger, was reputed to be ſuch, and thereby the ſurety ſtood bound in the ſame manner as if *Henderſon* had acted under a proper authority.

It had been *objected*, 2*do*, for *John Grant*, That as the late Lord Lion, to whom the bail-bond had been taken, was dead at the time of the offences ſaid to have been committed againſt *Forbes*; and as the bail-bond was not taken to his ſucceſſors in office; *John Grant*, the cautioner in the bail-bond, was free: That the late Lord Lion was the only creditor in the obligation, and the obligation ceaſed with his death.

Anſwered for *Forbes*, As by the conception of the bail-bond, damages are made payable to the party intereſted and wronged; ſo every perſon muſt be underſtood to be a creditor to whom the wrong or damage was done, whether the Lord Lion, who took the bail-bond, was dead or alive, when ſuch wrong or damage was committed.

"The Lords repelled theſe objections." J. D.

Act. *Miller, And. Pringle, Advocatus, Hamilton-Gordon.* Alt. *J. Dalrymple, Montgomery, Lockhart.*

N° CXIX. 11th *July* 1758.

ROBERT BARCLAY,

AGAINST

ARCHIBALD DOUGLAS of *Dornock.*

A father liable to pay an account of furniſhings to his ſon, though living ſeparately from him, he minor, and not entered to any employment.

Robert Barclay tailor in *Edinburgh*, furniſhed *Archibald Douglas* of *Dornock*, for an account of tailor-furniſhings made all at one time to his eldeſt ſon, amounting to *L.* 36.

The debt was contracted by *Dornock*s ſon, when eighteen years of age, without aliment or profeſſion, and not living with his father, on account of ſome differences betwixt them; the debt was high, conſidering the circumſtances of father and ſon; but for this the purſuer aſſigned, as the reaſon, that at the time of contracting it, the ſon's friends were ſoliciting a commiſſion in the army for him.

"The Lords found the defender liable." J. D.

Act. *J. Craigie.* Alt. *Hew Dalrymple.*

N° CXX.

N° CXX. 11th *July* 1758.

THOMAS GORDON of EARLSTON,

AGAINST

ALEXANDER KENNEDY of KNOCKGRAY.

An adjudication, without infeftment, is a good title of prescription as to teinds.

THomas *Gordon* of *Earlston* having right to the patronage of the parishes of *Dalry* and *Carsfearn*, with the teinds, parsonage and vicarage, thereof, brought an action before the court in the year 1740, against the heritors of these parishes, for payment of their bygone teinds. *Alexander Kennedy* of *Knockgray*, one of the defenders, *insisted* upon a title in his own person, to the teinds of his lands, *viz.* an adjudication of the lands of *Knockgray*, with the teinds and pertinents thereof, led at the instance of *John Whiteford*, against *Alexander Gordon* then of *Knockgray*, in the year 1691. To this adjudication the defender had right by progress; and having brought a proof of forty years possession of the teinds of these lands, he *contended*, That he had thereby acquired a right by the positive prescription.

Pleaded for the pursuer, 1*mo*, Neither the adjudication upon which the defender founds his right, nor the grounds upon which it proceeds are produced. The defender acknowledges, that he has lost the adjudication, and refers to the records; but that is not sufficient in a competition of heritable rights, in which a preference is to be sustained to one of the parties. A title is as necessary as possession, in order to establish a right by prescription; and where the sole title upon which prescription is pleaded is only a decreet of adjudication without infeftment, it is the more necessary to produce the grounds of debt upon which it proceeded. Such decreet of adjudication passes of course *periculo petentis*, and could not be the foundation of an incumbrance upon any part of the lands, even after forty years possession, without production of the grounds of debt; and therefore cannot be sustained as a title of prescription of the property of the teinds, without such production. 2*do*, Supposing the adjudication, and grounds thereof, were produced, it is no sufficient title upon which the defender can justly plead the benefit of the positive prescription, unless he can instruct a right to the teinds in the person of the debtor against whom the adjudication was led. A decreet of adjudication, neither clothed with infeftment, nor supported by an anterior title in the person of the debtor, is not such an heritable title as can fall under the words or spirit of the statute 1617. It is truly a right of the adjudger's own creating; because it proceeds upon the sole assertion of his libel, that certain lands, teinds, or other subjects, belonged to his debtor. The validity of this right must depend upon the right which was in the debtor to the subjects adjudged, so long as the adjudger rests upon his decreet of adjudication: and if he omits to complete his adjudication by charter and infeftment,

ment, he cannot plead the benefit of the ſtatute of preſcription; becauſe he cannot inſtruct an heritable title to the ſubjects adjudged, proceeding from *any ſuperior or author*, in terms of that ſtatute. 3*tio*, There is not the leaſt colour for ſuppoſing that *Gordon* of *Knockgray*, againſt whom this adjudication was led, had any right whatſoever to the teinds of his lands. This was ſo generally known in the 1691, when the eſtate was adjudged by various creditors, that none of them adjudged the teinds, excepting the ſaid *John Whiteford*, who adjudges the lands, *with the pertinents and teinds thereof*; which words have plainly been thrown in at random. And ſeveral circumſtances occur in this caſe, which tend clearly to ſhow, that *Gordon* of *Knockgray*, and the perſons afterwards deriving right from him by progreſs, with whom the defender connects, did none of them imagine, that he had any right to theſe teinds. So that the defender's whole plea in this caſe reſts ſolely upon the ſlender foundation of his uncompleted adjudication, which, when looked into in the record, appears alſo to be full of many groſs blunders and contradictions in very material articles, which occaſion a total uncertainty as to the extent of the ſum truly due: and therefore, upon this laſt ſeparate ground, it ought not to be ſuſtained as an heritable title of property ſufficient to found the poſitive preſcription.

Anſwered for the defender: To the *firſt*, The purſuer cannot ſhow the ſmalleſt intereſt he has to demand that the decreet of adjudication itſelf ſhould be produced. Indeed it cannot now be recovered, as it was loſt by an accident in the year 1739. The purſuer has ſeen it in the record, and there can be no uſe for extracting it of new. And with regard to the grounds of the adjudication, the production of theſe is equally unneceſſary after forty years poſſeſſion has followed; and the adjudication has become an abſolute right of property, which cannot now be challenged upon any ground whatever.

To the *ſecond*, If the adjudger could inſtruct a right to the teinds in the perſon of him againſt whom the adjudication was led, there would be no neceſſity for preſcription, nor could it make the right either better or worſe; the adjudication itſelf would, without the help of the poſitive preſcription, tranſmit the right from the debtor to the adjudger: and as the only uſe of the poſitive preſcription is, to ſupply the want of right in the perſon againſt whom the adjudication is led, after forty years poſſeſſion, it ſuperſedes the neceſſity of any farther inquiry into the right of the author, which the law preſumes, *præſumptione juris et de jure*. The ſtatute 1617, although it ſeems, by the ſtrict words, to require an infeftment in order to eſtabliſh a proper title of preſcription; yet it has always been more largely explained both by our lawyers, and the deciſions of the court, and has been extended to rights not eſtabliſhed by infeftment; *Stair*, *tit. Preſcriptions*, § 23. Teinds may be conſtituted and tranſmitted by infeftment, yet ſtill they are a perſonal ſubject of ſuch a nature as to paſs by a right merely perſonal. In general, the rule is, That where they have been once veſted by infeftment, an infeftment will likewiſe be neceſſary to denude the former proprietor; but where the right of the teinds has not been eſtabliſhed by infeftment, ſuch teinds can be tranſmitted without infeftment, and completely carried by a perſonal right: and, in the preſent caſe, there is real evidence, that the teinds in queſtion never were eſtabliſhed by any infeftment. An adjudication, if led againſt a perſon having a full

right to the teinds, immediately, without any infeftment, transfers the full right to the adjudger, ſubject only to the legal reverſion: and, on the other hand, an adjudication, when clothed with forty years poſſeſſion, will give a complete right to the adjudger by the poſitive preſcription, even although the adjudication was led againſt a perſon having no earthly right to the teinds.

To the *third*, After the adjudication is ſecured, by the poſitive preſcription of forty years, it becomes an abſolute right of property; nor is the adjudger now obliged to anſwer to any objections ariſing either from defect of right in the debtor, or informalities in the diligence. It is ſufficient for him to ſay, That the teinds were adjudged to him, and that he has poſſeſſed the ſame without interruption for the ſpace of forty years. Beſides, the blunders and contradictions imputed by the purſuer to this adjudication, appear to be of no moment when examined, ſuppoſing it were now competent to inſiſt upon them.

"The Lords found, That the defender had acquired a ſufficient right "to the teinds of his lands by the poſitive preſcription." E. C.

Act. *Miller.* Alt. *Macqueen.* Clerk, *Kirkpatrick.*

N° CXXI. 12th *July* 1758.

The KING's COLLEGE of ABERDEEN,

AGAINST

ALEXANDER LORD FALCONER of HALKERTON, and others.

Heritors are not bound to tranſport their valued teind victual to a market-town.

THE parſonage and vicarage of the pariſh of *Aberbuthnot*, now *Marykirk*, in the county of *Kincardine*, belonged anciently to the hoſpital or convent of *Red friars* at *St Germain's* in *Eaſt Lothian*.

In 1494, *Thomas Pyot*, maſter of that hoſpital, diſponed the teinds of the ſaid pariſh to *William* Biſhop of *Aberdeen*, founder of the *King*'s college, by whom the ſame were annexed to the college. This right was in 1497 confirmed by act of parliament.

From the time of that annexation, the college poſſeſſed the teinds of the ſaid pariſh; but it not being found convenient to draw the *ipſa corpora*, tacks of the teinds were from time to time granted by the college to the reſpective heritors within the pariſh.

In 1756, the college raiſed a proceſs for valuation of the teinds of this pariſh, in common form, againſt the whole heritors.——Upon adviſing the proof of the rental, which conſiſted chiefly of the depoſitions of the tenants, the Lords Commiſſioners pronounced decreet, "finding and declaring the juſt worth and conſtant yearly *avail* of "the teinds, parſonage and vicarage, of the reſpective defenders their "lands libelled, to be now, and in all time coming, the quantities of "victual, and ſums of money (therein) particularly ſpecified."

After

After extracting this decreet, the college *inſiſted*, That the heritors were bound to make their tenants tranſport the victual-teind thereby payable to any place, in the option of the titulars, at as great a diſtance as the tenants were bound, either by tack or cuſtom, to tranſport their victual-rent payable to the heritors.—— Of this demand Lord *Halkerton*, and other heritors, complained by ſuſpenſion to the court of ſeſſion.

Pleaded for the college, 1*mo*, As the tenants are bound to carry their whole victual-rent, teind included, to the next market-town, the heritors can have no intereſt to oppoſe the tenants carrying that part of the rent which belongs to the college, to the ſame market-town, alongſt with their own. The refuſing ſuch carriage is calculated to oblige the college to convert the teind-bolls below the market-price, as it has neither horſes nor ſervants for collecting and tranſporting the victual from the ſeveral farms to the market.

2*do*, The 17th act of King *Charles* I. declares, That the juſt rate of teinds, when valued, ſhall be the fifth part of the conſtant rent which the lands pay in ſtock and teind.—— A titular is therefore intitled to a fifth of the rent in as ample and beneficial a manner as the heritor is intitled to the remaining four parts. If the tenant is only bound to deliver his victual-rent at his own barn, the titular cannot demand delivery at any other place; but if the maſter, inſtead of exacting the full number of bolls which the farm might yield, payable on the ground, ſhall take a leſſer number of bolls, and, in conſideration thereof, oblige his tenant to carry their victual to a diſtant market, where he will receive a greater price for his victual than upon the ground, the titular will not receive his fifth part of the rent, unleſs it is delivered to him at the ſame place where the total rent was deliverable to the maſter at the time of valuation.

3*tio*, Had the victual-teind been converted into money in the proceſs of valuation, the converſion would have been regulated by the price which the victual would give at the place where it was deliverable to the heritor, and not the price it would give on the ground of the lands, or at the heritor's dwelling. Thus the titular would have had the full fifth of the rent in that caſe; and where there is no converſion, the carriage of the victual, which is a *modus* of the rent, cannot be ſeparated from it, without diminiſhing the compoſition given by law to the titular for the teinds. And,

4*to*, After valuation, the titular has right to the full fifth of the rent, and can levy it from the tenants, if the maſter does not pay it; and conſequently he can exact it from them in the ſame way that it is payable to the maſter; nor can he be in a worſe caſe when the maſter himſelf makes payment of the valued teind.

Anſwered for the heritors, 1*mo*, Teinds were originally allotted for the maintenance of thoſe who diſcharged the miniſterial functions in that tract of ground where the ſubject of the teind was produced.—— In proceſs of time teinds were allotted for the ſupport of clergy reſiding at a diſtance, and even of ſuch uſeleſs members of ſociety as the Red friars of *St Germain's*, whoſe religious duty it was to entertain all vagrants who went on an idle errand to the Holy Land. When payment of teind ſo far deviated from the original inſtitution, it happened of courſe, that the teinds were not of equal value as when deſtined to the

ſupport

ſupport of the clergy reſiding on the lands where the teinds are drawn. It is a certain maxim, That the change of the creditor alters not the nature or extent of the debt: the expence of tranſporting teind-victual is therefore a burden which neceſſarily falls on him who has right to teinds in a way contrary to their primary inſtitution. Nor can the heritors of *Marykirk* be bound to more ſevere preſtations in favour of the college of *Aberdeen*, than they could be in favour of the Red friars, or original titulars, did they ſtill ſubſiſt.

2*do*, By the act 1633, teinds belonging to univerſities may be valued, but cannot be purchaſed, which is a loſs to the heritors. They muſt for ever remain liable in a fifth of the conſtant rent, as at the time of valuation. But as before valuation, the titular who draws the *ipſa corpora* of the teind, muſt draw the ſame upon the ground which produces it, and muſt be at the expence of carrying it off, without being even permitted to ſtack it upon the ground; ſo there is no reaſon why a different rule ſhould obtain after valuation, further than that the heritor being thereby allowed to carry the whole crop to his barn-yard or granary, the proportion declared to be teind muſt afterwards be deliverable at that place to which he is intitled to carry it for his own conveniency. Were the valuation made from the drawn teind, there could be no pretence for this demand; and where it is made on a proof of the ſtock and teind, there is no reaſon for ſubjecting the heritor to a burden before unknown.

3*tio*, It is a miſtake to conſider the carriage in queſtion as part of the rent. — Tenants in *Scotland* do not put a value upon ſuch ſervices, nor could more rent be expected were they diſcharged, although it might be otherwiſe beneficial for the maſter to relieve the tenants of ſuch a burden. — Services not converted are never taken *in computo*, in valuations of teinds, nor in judicial ſales. — An obligation to perform a carriage of this kind is not conſtant, but is often diſpenſed with when the heritor has occaſion to uſe his victual at home; and it is therefore yielded by the tenant in favour to the maſter, and not as an increaſe of rent. — Such carriage ſtands on the ſame footing with all other perſonal ſervices not converted; and is not a *modus* of the rent, but is eaſily ſeparable from it, were it a teindable ſubject, as it clearly is not.

4*to*, The act 17. 1633, ordains, " The prices of victual, and other " bodies of goods whereof the teind conſiſts, to be redacted into mo- " ney, according to the worth and price of victual and goods *in ſuch* " *part of the country*." And the act 19. 1633, appoints the commiſſioners " to ſet down the prices of ſaleable teinds, according to the " worth thereof *in each part* of the country *where the ſame grow and* " *are bred*." — This ſhows, that the value on the ground is the rule; nor is any mention made in the ſtatutes of the value at any *market-town*. —— And,

5*to*, Whatever might be ſaid in behalf of this new claim before valuation, it is now foreclоſed by the decreets of valuation, which cannot be altered by this court. — Theſe decreets do not aſcertain in general the fifth of the rent to be paid; but declare certain quantities of victual to be payable as the avail of the teind. The titular has therefore nothing to demand from the heritor but the preciſe quantities modified in lieu of the teind; and as no place of delivery is aſcertained by the decreets,

decreets, the common rule of law muſt take place, that payment muſt be taken at the domicil of the debtor, or at his granary, upon the lands where his corns are laid up. — When the heritors offer this, they offer ſufficient implement of the decreets againſt them. Nor is there a ſingle inſtance where, in any valuation, heritors were decerned to tranſport victual to market-towns for the benefit of the titular.

Replied for the college, It is only the buſineſs of the commiſſion to aſcertain by proof what the conſtant or ſtanding rents of the lands is at the time of the valuation. — When that is proved, the fifth part thereof is declared by law to be the teind in all time coming. The aſcertainment of that fifth can be nothing but the operation of figures; and it can make no difference upon the nature of the titular's right, whether the amount of it is expreſſed in the decreet of valuation or not. The valued teind muſt therefore ſtill be conſidered as the fifth of the rent, and ought to be delivered in the ſame manner with the other four fifths payable to the heritor; and it has been the cuſtom for heritors to deliver it accordingly both to colleges and miniſters, though not ſpecially decerned ſo to do. As it belongs to the court of ſeſſion to award execution on decreets of valuation; ſo where there is no place of delivery ſpecified in the decreet, it muſt be inherent in the juriſdiction committed to the ſeſſion to determine the place of delivery; and in doing ſo, the common rule as to the *locus ſolutionis* muſt give way to other conſiderations applicable to this particular caſe.

" The Lords found, That the ſuſpenders were not obliged to tranſ-
" port their teind-victual to a market-town." D. R.

For the College, *Burnet, Miller, Advocatus.* Alt. Sir *Dav. Dalrymple, Ferguſon.* Reporter *Woodhall.*

N° CXXII. 12th *July* 1758.

Captain JOHN NOBLE of FARM,

AGAINST

ANNE DEWAR relict of GEORGE NAPIER of KILMAHEW.

1. *A truſt-adjudication againſt an apparent heir under a tailzie, not recorded, a good title to purſue reduction of rights affecting the eſtate.* —— 2. *An unregiſtered tailzie, a ground for reſtricting an extravagant jointure to a reaſonable proviſion.*

IN 1687, *John Napier* of *Kilmahew* made a ſettlement of his eſtate, in favour of himſelf, and a certain ſeries of heirs, in the form of a ſtrict entail, with the uſual prohibitive and irritant clauſes; but under an exception, that the heirs of entail might grant liferent-infeftments to their ladies, not exceeding a third of the lands, ſo far as the ſame are free, and unaffected for the time with former liferents or real debts.

Upon the death of the tailzier, the ſucceſſion opened to *George Maxwell*, the eldeſt ſon of his eldeſt daughter; who aſſumed the name of

Napier, and was ſerved heir in general of tailzie and proviſion to the ſaid *John Napier* the tailzier, whereby he had right to the unexecuted procuratory in the bond of tailzie.—He thereupon reſigned the eſtate in 1695, and obtained a charter from the ſuperior, upon which he was infeft. In both the charter and ſeiſin, the whole prohibitory, irritant, and reſolutive clauſes were inſerted; but the tailzie never was recorded in terms of the act 1685.

The ſaid *George Napier* had a ſon, who married Lady *Jean Bruce*, and in the marriage-contract the father provided her to a liferent out of the eſtate; but the ſon died in his father's lifetime without leaving iſſue.

George Napier taking advantage of the non-regiſtration of the tailzie, ſold off the greater part of the eſtate; and Lady *Jean Bruce* having conſented to the ſale, and to a reſtriction of her proviſion, her liferent was thereby reduced to about *L.* 50 *per annum*. The reſidue of the eſtate was alſo adjudged for conſiderable debts.—Having become a widower, he entered into a ſecond marriage with *Anne Dewar*, who brought him no portion; and in 1737, when he had no proſpect of having children by her, he entered into a poſtnuptial marriage-contract, whereby he diſponed to his wife, in caſe of her ſurviving him, the total liferent of the eſtate of *Kilmahew*, with the manſion-houſe, gardens, and incloſures, and the whole woods growing on the eſtate, with power to cut and diſpoſe of the ſame.—By the ſame deed, he ſettled upon her his whole perſonal eſtate; and, of the ſame date, granted her an heritable bond for *L.* 500 *Sterling*, under condition, that it ſhould ſubſiſt only to the extent of his funeral charges, and other privileged and perſonal debts owing by him at his death, to be paid by her. Upon this contract and bond, infeftment was taken of the ſame date.

Kilmahew died in the year 1744 without iſſue, whereby the ſucceſſion to the reſidue of the tailzied eſtate opened to *Jean Smith*, his grandniece. *Anne Dewar* the relict intromitted with his whole moveables, and entered to poſſeſſion of the eſtate, in virtue of her liferent proviſion.—She paid Lady *Jean Bruce*'s jointure out of it till the 1754, when that lady died; and the total free rent was about *L.* 102 *Sterling per annum*, excluſive of the woods.

Jean Smith afterwards granted a truſt-bond to Captain *Noble*, upon which he obtained an adjudication of the eſtate againſt her, as charged to enter heir of tailzie and proviſion to *Kilmahew*. Upon this title, he inſiſted in a proceſs againſt *Anne Dewar*, for reducing her liferent-proviſion, and the ſaid heritable bond, upon the act 1621, as being *gratuitous* alienations made in defraud of the ſaid *Jean Smith*, a juſt and lawful creditor upon the eſtate, as next heir of entail.

Objected for the defender, 1*mo*, The letters of ſpecial charge upon which the purſuer's adjudication proceeded, were not ſideſcribed, as is expreſsly directed by act of ſederunt 8th *July* 1691.—2*do*, *Jean Smith*'s granting a bond to Captain *Noble* for his adjudging the eſtate, is directly contrary to the prohibitions upon which this action is founded; and by the decreet of adjudication he is ordained to be infeft in the lands, without any mention of the limitations or irritancies of the tailzie, although by the act 1685, theſe ſhould be repeated in every conveyance of the eſtate.

Anſwered for the purſuer, 1*mo*, The act of ſederunt does not declare the omiſſion of ſideſcribing to be a nullity of the diligence; nor was the

the objection ſtated, as it ought to have been, before taking a day to ſatisfy the production.—2*do*, The declared purpoſe of the truſt-adjudication is only to found this tentative proceſs; and it is *jus tertii* for the defender to object to the purſuer's title on a ground which could only be competent to an after heir of tailzie.

Further *pleaded* for the purſuer, *Kilmahew*'s only title to the eſtate was in quality of an heir of tailzie; and although the tailzie was not recorded, yet the prohibitions and irritancies contained in his own right, muſt be effectual againſt himſelf and his gratuitous diſponees.—Marriage is an onerous cauſe for a rational proviſion to a wife; but in ſo far as the proviſion made exceeds the obligation on the huſband, it is gratuitous, and reducible, as in *fraudem creditoris*. A total liferent of a man's eſtate is certainly an irrational and extravagant proviſion for a wife, eſpecially one who brought nothing with her.—Here ſhe cannot be preſumed to have been ignorant of the entail, as ſhe had been married ten years before the contract.—The law points out a terce of the huſband's eſtate as a reaſonable proviſion, and this entail limited the liferents to be granted to wives to a third of the free rent; which therefore ought to be the rule.

Anſwered for the defender, The rationality of a wife's proviſion muſt depend on circumſtances. When a man's eſtate is reduced to a narrow compaſs, the whole will not be ſo ſuitable, as a third might have formerly been. That was the caſe here. The whole is not too liberal an allowance for the widow of a gentleman of family and rank. Beſides, at the time of granting this proviſion, and for many years thereafter, the eſtate was burdened with another liferent, exceeding the half of the free rent, and the annualrents of the other debts exceeded the whole rent of the eſtate; ſo that ſhe now owes her poſſeſſion to the tolerance of the creditors. The court has, in many caſes, ſuſtained proviſions to a wife beyond the extent of a terce, though made by a huſband *obæratus*, and that although ſhe brought no portion with her, *Diction. vol.* 1. *p.* 70. 71. Regard is to be had to the rank of the huſband: and if theſe proviſions have been ſuſtained in queſtions with onerous creditors, *multo magis* muſt ſuch liferent be ſuſtained againſt an heir claiming under an unregiſtred entail. The words of the entail cannot determine the extent of the liferent; becauſe it was not recorded, ſo not good againſt the wife, in ſo far as ſhe is an onerous creditor for her proviſion; and were it to be followed, ſhe would get nothing, as there is truly no free rent.

Replied, That ſuppoſing all the debts were preferable to this liferent-proviſion, and that the intereſt exceeded the rent; yet the heir of entail, as creditor in the reverſion of the eſtate, has a good title to reduce a gratuitous ſettlement, whereby the defender pockets up the rents which ought to be applied for the payment of the annualrents.

" The Lords ſuſtained the purſuer's title; and found, That the life-
" rent is to be reſtricted; and in order thereto, remitted to the
" Lord Ordinary to inquire into the circumſtances of the eſtate at
" the time of the marriage-ſettlement in *October* 1737."

Nota. By a ſubſequent interlocutor, 3d *March* 1759, the Lords found, " That the defender's liferent is not to be reſtricted to a third " of the free rent of the eſtate, conform to the entail; but before re-
" ſtricting

" ſtricting the ſaid liferent to any preciſe extent, ordained a ſcheme to " be given in, ſhewing the amount of the free rent of the eſtate, after " deducing the annualrent of the debts affecting the ſame at the expi- " ration of Lady *Jean Bruce*'s liferent."

By that ſcheme, the free rent amounted to *L.* 42 : 11 : 5 *Sterling*. And,

By interlocutor of the 11th *July* 1759,

" The Lords reſtricted the defender's liferent to 600 merks *Scots* " yearly." D. R.

Act. *Dav. Rae, Tho. Miller.* Alt. *Ilay Campbell, J. Fergusſon.* Reporter, *Preſtongrange.*

N° CXXIII. 12th *July* 1758.

WILLIAM TOD,

AGAINST

PATRICK MAXWELL merchant in *Dundee.*

Recourſe refuſed on a bill proteſted on the day after the laſt day of grace, though no damage could be ſaid to ariſe by delaying the proteſt.

UPon the 25th *March* 1757, *Maxwell* drew a bill upon *Butter* and *Crawfurd* at *London* for *L.* 50, payable 24th *April* 1757, directing the money to be placed to his account. This bill was indorſed to *William Tod*, and duly accepted.

The bill was proteſted on *Thurſday* the 28th *April* 1757 for not-payment, and notice ſent by that night's poſt of the diſhonour. An action for recourſe was afterwards brought againſt *Maxwell.*

Pleaded in defence, The bill ought to have been proteſted on the 27th *April*, the laſt of the three days of grace; and therefore was not duly negotiated.

Anſwered, 1*ſt*, *Maxwell* cannot object to the negotiation of the bill, without proving, that *Butter* and *Crawfurd* were his debtors at the time the bill was preſented, the contrary of which was preſumable from the laſt words of the bill; and the only evidence produced by *Maxwell*, is an account dated four months before, by which a balance is due to him of *L.* 100 : 16 : 6.

2*dly*, *Maxwell* ſuffered no damage by the delay of the proteſt: for it is offered to be proved, that *Butter* and *Crawfurd* had ſtopped payment on *Monday* the 25th of *April*; and that no bills proteſted againſt them either on the *Monday* or *Tueſday* were recovered.

3*dly*, As *Wedneſday* the 27th, the laſt day of grace, was not a poſt-night to *Scotland*, and advice was given of the diſhonour by the *Thurſday*'s poſt, *Maxwell* was therefore acquainted, that payment had been refuſed, as ſoon as if the proteſt had been taken on *Wedneſday*; and therefore could not pretend, that any damage had been occaſioned by the want of due negotiation.

" The Lords refuſed recourſe upon this bill, and found expences " due." W. J.

Act. *Johnſtone.* Alt. *Macintoſh.*

N. B.

N. B. In this caſe it was admitted, that bills drawn from *Scotland* upon *London*, have not the privilege of four days of grace; and that the deciſion obſerved by Mr *Falconer*, 29th *January* 1751, *Crookſhanks* againſt *Mitchell*, is wrong marked, the interlocutor there recited having been finally altered.

N° CXXIV. 12th *July* 1758.

PETER SIMSON,

AGAINST

HAMILTON of PANCAITLAND.

Determination of a miniſter's ſtipend, whether regulated by the old or new ſtyle?

Matthew Simſon had been ordained miniſter of *Pancaitland* before the late correction of the calendar. He died on the 20th *May* 1756.

Peter Simſon, his ſon and executor, claimed, in terms of the act 13. 1672, one half of that year's ſtipend, on account of his father's incumbency, and another half as the ann, in reſpect his father had ſurvived *Whitſunday* new ſtyle.

Mr *Hamilton* of *Pancaitland*, patron of the pariſh, claimed the half-year's ſtipend due at *Michaelmas* 1756, as vacant ſtipend, in reſpect *Matthew Simſon* had not ſurvived *Whitſunday* old ſtyle.

The queſtion was, Whether the determination of a miniſter's ſtipend, who had been ſettled previous to the correction of the calendar, is to be regulated by the new or the old ſtyle?

The Lords had in a former caſe, *Anderſon contra* executors of *George Home*, 25th *June* 1757, found, that the old ſtyle was the rule. *Vide* the arguments on both ſides in that caſe, N° 30. of this collection. But now, on the contrary,

"The Lords preferred the executor of *Matthew Simſon*." J. D.

Act. *J. Dalrymple, Advocatus.* Alt. *Hamilton-Gordon, Lockhart.*

N° CXXV. 18th *July* 1758.

GILBERT JACKSON, and others,

AGAINST

JAMES HALIDAY, and others.

Competition between adjudgers and arreſters.

ON the 5th *November* 1750, *William Ferguſon* diſponed his lands of *Cairoch* to *Duke* and *Brown*; and they became bound to redeem

theſe lands from Mr *Heron*, to whom they had been diſponed under reverſion, and to grant backbond to *Ferguſon*, declaring the lands redeemable between and *Martinmas* 1751, upon payment of debts due to them, and of the redemption-money they were to pay to *Heron*; under condition, "That if *Ferguſon* ſhould not redeem at *Martinmas* 1751, "they ſhould be at liberty to ſell the lands by public roup, and take "the ſecurity of the price payable to themſelves, and to be only "liable to *Ferguſon* for any balance, after payment of their debts and "expences."

On the 24th *July* 1752, *Grierſon*, a creditor of *Cairoch*'s, obtained an adjudication againſt him of all right of reverſion competent to him.

Haliday and others executed ſummonſes, and obtained decreets of adjudication within year and day of *Grierſon*'s: but between the execution of their ſummons, and the obtaining their decreet, *Duke* and *Brown*, on the 17th of *May* 1753, ſold the lands by roup to *Agnew*; who granted bond to *Duke* and *Brown*.

Jackſon and others uſed arreſtment in the hands of *Duke* and *Brown*, after *Martinmas* 1751, but before the ſale to *Agnew*; and after the ſale, they arreſted alſo in the hands of *Agnew*.

Certain other creditors arreſted in the hands of *Duke* and *Brown* after the ſale.

Objected by the arreſters againſt *Grierſon*'s adjudication, That as the term limited for redemption was elapſed before his adjudication was obtained, *Ferguſon*'s right, being then only a perſonal claim for the balance of the value, could not be carried by adjudication.

Anſwered, The ſale to *Duke* and *Brown* was *pactum legis commiſſoriæ*; and therefore *Ferguſon* had a right of redemption after *Martinmas* 1751, till the lands were ſold, which was properly carried by *Grierſon*'s adjudication; and by the nature of the tranſaction, *Duke* and *Brown* did not become proprietors after *Martinmas* 1751, though at that term their right to ſell the lands commenced.

Objected to the adjudications led by *Haliday* and others, That after the ſale to *Agnew*, *Ferguſon* had no right to redeem the lands. His claim was only for a balance of the price; a moveable ſubject, not attachable by adjudication.

Anſwered, Theſe adjudgers had executed their ſummonſes before the ſale to *Agnew*, after which no voluntary deed could have the effect to diſappoint them, though, no doubt, the ſale was notwithſtanding competent in conſequence of the prior powers. *2dly*, As their decreets were within year and day of *Grierſon*'s, the validity of his adjudication muſt ſupport them; agreeable to a deciſion in the ranking of *Netherwood*, 29th *January* 1748, *Irving contra* Sir *William Maxwell* of *Springkell*, where one creditor adjudged before a judicial ſale by an apparent heir, and another after the ſale, but within year and day of the firſt, and both adjudications were ranked equally. The deciſion in the ranking of *Bonjedward* was alſo referred to, 9th *June* 1755; and the common practice of leading adjudications againſt an eſtate after a judicial ſale, in order to convey them to the purchaſer.

Objected to the arreſtments in the hands of *Duke* and *Brown* before the ſale, That *Ferguſon*'s right was at that time not a moveable claim, but a right of reverſion not arreſtable.

Anſwered, From the elapſe of the term for redemption, *Ferguſon*'s claim was only for the balance of the value.

No

No objection was made to the arreſtments in the hands of *Duke* and *Brown* after the ſale, but againſt the arreſtments in the hands of *Agnew*.

Objected, That *Agnew* was not debtor to *Ferguſon*, but to *Duke* and *Brown*; and though *Ferguſon* might have been intitled to inſiſt in a declarator againſt *Agnew*, that the ſurplus price belonged to him in preference to his truſtees; yet this was not ſo direct a claim, as to found an arreſtment: nor could arreſtment be competent in the hands of diſtinct perſons to attach the ſame ſubject.

Anſwered, That by the accuſtomed ſtyle of arreſtments, all moveable ſubjects are attached, not only due directly to the principal debtor, but "to any other perſon or perſons *for his uſe and behoof*, by bond, "bill," *&c.* And there can be no diſpute, that *Agnew* owed the ſurplus price in this caſe to *Duke* and *Brown*, for the uſe and behoof of *Ferguſon*.

"The Lords found, That the adjudications were the only proper di-
"ligence to carry *Cairoch*'s intereſt in the lands, and the price
"thereof; reſerving the conſideration of the competency of the
"arreſtment in the hands of *Nathaniel Duke* and *Patrick Brown*,
"and thoſe in the hands of *David Agnew* the purchaſer." W. J.

For the arreſters, *Montgomery*. Alt. *Lockhart*. Clerk, *Kirkpatrick*.

N° CXXVI. 19th *July* 1758.

MACNAB of MACNAB,

AGAINST

The EARL of BREADALBANE, and CAMPBELL of AUCHLYNE.

Lands found aſtricted, notwithſtanding a clauſe cum molendinis et multuris *in the* Tenendas *of a vaſſal's charter.*

IN the year 1707, Mr *Campbell* of *Auchlyne* got a wadſet-right, from the Earl of *Breadalbane*, of the mill of *Auchlyne*, and mill-lands thereof, ſucken, multures, *&c.*; and, amongſt others, of the multures, ſequels, *&c.* of the lands of *Ewer*, *Aucheſen*, *Craigchur*, and *Bovain*, belonging in property to *Macnab*. Upon this title, *Auchlyne* having brought an action of abſtracted multures againſt the tenants of theſe ſeveral lands belonging to *Macnab*, compearance was made for him in the proceſs; which was conjoined with a declarator of immunity from the aſtriction, raiſed by him.

Pleaded for *Macnab*, That *Alexander Macnab*, his grandfather, having, in the year 1662, obtained from the predeceſſor of the Earl of *Breadalbane*, a charter of the above-mentioned lands, to himſelf, and the heirs therein mentioned, containing, in the *Tenendas* thereof, the words *cum molendinis*, *multuris*, *et eorum ſequelis;* and his father *Robert Macnab* having, in the year 1714, obtained from the Earl of *Breadalbane* a precept of *Clare conſtat*, containing a clauſe of *Novodamus*, for infefting

fefting him in the ſaid lands, as heir to his father, *cum molendinis, multuris, et eorum ſequelis*; it was evident therefrom, that theſe lands were free from aſtriction to any mill belonging to the family of *Breadalbane* at both theſe periods. That although it was true, that the tenants in theſe lands had been in uſe to go to the mill of *Auchlyne*, and pay inſucken multure for their corns grinded there, and to perform ſervices to the mill; yet no aſtriction was thereby acquired; as the years of preſcription were not run, in regard it was interrupted by abſtractions, which were admitted to have been made in the year 1746; neither was the wadſet-right in 1707 a title of preſcription, nor were the years of preſcription run upon it.

Anſwered, That it appeared from the proof which had been adduced, that the tenants of the above-mentioned lands, for upwards of forty years from the time of leading the proof, which was in the year 1750, had been in the conſtant uſage of carrying their corns to the mill of *Auchlyne*, and of paying a high inſucken multure, and performing ſervices to that mill; and even when they removed without the ſucken, of carrying their laſt crop to be grinded at this mill, for payment of full multure, or otherwiſe of compounding with the miller for the multure of the corns they ſo carried off; ſuch conſtant poſſeſſion was ſufficient to ſhow an aſtriction, eſpecially as this mill was the mill of a barony: That much ſlenderer poſſeſſion has been ſuſtained by the court to infer an aſtriction; particularly in a deciſion quoted by Lord *Stair*, in his *Inſtitutes*, title, *Servitude real*, § 24. *January* 1672, Lord *Newbaith* againſt Lady *Whitekirk*; and in two late caſes, decided in the year 1740; the one, *Brown* againſt *Fletcher* of *Ballinſhoe*, and the other, *Ferguſon* againſt *Thomſon*, as to the aſtriction of the lands of *Achtidonnel* to the mill of *Aden:* That this conſtant poſſeſſion ſhows the meaning of parties to have been, that the lands were to continue aſtricted, notwithſtanding the clauſes *cum molendinis et multuris* in the *Tenendas* of the above-mentioned charters granted to *Macnab*; and that the rather, becauſe it appears from the old tacks of this mill, that the rent thereof continued the ſame after the charter 1662 that it was before; and that it could by no means be ſuppoſed, that the Earl of *Breadalbane*, by granting the precept of *Clare conſtat* above mentioned, in the year 1714, intended to diſcharge an aſtriction to a mill, of which he was previouſly denuded, and to contravene the abſolute warrandice contained in the wadſet-diſpoſition granted by him in the year 1707.

Replied for *Macnab*, *1ſt*, As no aſtriction of theſe lands appears anterior to the charter 1662, there ariſes from thence, and from the precept of *Clare conſtat* in the year 1714, a legal preſumption, that theſe lands were never thirled to that mill: That the charter 1662 had been granted in conſequence of a ſubmiſſion entered into betwixt the predeceſſors of the Earl of *Breadalbane* and *Macnab*, concerning what ſhould be paid for a renewal of the inveſtiture in *Macnab*'s favour, and what clauſes ſhould be therein inſerted; which ſubmiſſion was produced: That altho' the learned arbiters therein named did not in form pronounce any decreet-arbitral; yet they are ſigning witneſſes to the charter 1662, containing a clauſe *cum molendinis*; whence it ſeems plainly to have been their opinion, as well as that of the granter of the charter, that theſe lands had formerly been, and were afterwards intended to be held free from any aſtriction; and this opinion or intention is evidently and explicitly confirmed by the repetition of the clauſe *cum molendinis* in the

ſubſequent

ſubſequent precept of *Clare conſtat* in the 1714, as it cannot be ſuppoſed, that ſo important a clauſe could be inſerted in theſe charters through inattention. *2dly*, Even ſuppoſing theſe lands had been previouſly thirled to this mill; yet the legal and neceſſary import of theſe clauſes in the charters is to liberate from ſuch aſtriction; ſeeing it is agreed upon by all our lawyers, and ſettled by many repeated deciſions of the court, that a clauſe in the *Tenendas* of a charter from a ſubject, containing *molendina cum multuris*, is ſufficient to infer a liberation, even from a former aſtriction; *Craig*, *lib.* 2. *d.* 8. § 11.; *Stair*, *book* 2. *tit.* 7. § 24.; *Bankton*, *book* 2. *tit.* 7. § 52.; *Deciſions*, *Veitch* againſt *Duncan*, 7th *December* 1665, obſerved by *Dirleton*; *Macpherſon* againſt *Macintoſh*, 1ſt *December* 1681; *Bunton* againſt *Boyd*, 17th *January* 1682, both obſerved by *Harcarſe*; *Ruſſel* againſt *Waddel*, *December* 1723, obſerved by *Home*; *Harrower* againſt *Horn*, 4th *January* 1750, obſerved by *Falconer*; and in a late caſe, betwixt the tackſman of a mill belonging to Sir *Thomas Wallace*, and the tenants of *Lockhart* of *Lee*. *3dly*, That there was in this caſe no right acquired by preſcription; becauſe, in the *firſt* place, a title in writ is neceſſary, in order to be a foundation of preſcription in thirlage, where the mill is neither a King's mill, nor did formerly belong to any eccleſiaſtical perſon, *Dict. Deciſ. vol.* 2. *p.* 105. But here there is no ſuch title produced as can in law be deemed the juſt foundation of any preſcription. The wadſet-right in 1707 is no proper title. The wadſetter can be conſidered in no other view than as having a temporary pledge for ſo much money, in whoſe favour a right by preſcription could not be created. The chief intereſt in this mill remained with the Earl of *Breadalbane*; and no preſcription could run in his favour, as he could not create a right in another to be the foundation of a preſcription for his own behoof. And, in the *ſecond* place, the years of preſcription are not run even from the date of the wadſet-right in 1707; and far leſs are they run from the 1714, the date of the precept of *Clare conſtat*.

Duplied: To the *firſt*, The mill in queſtion is the mill of a barony, and therefore the legal preſumption is, that theſe lands lying within the barony are aſtricted to it; and it appears from the proof, that the poſſeſſors of theſe lands have immemorially carried their corns to this mill, and paid the high inſucken multure, and performed other heavy ſervices, ſuch as are uſual in the ſtricteſt thirlage; which ſufficiently proves, that they muſt have been antecedently bound thereto; *Stair*, *b.* 4. *tit.* 15. *par.* 4. and 7.—— To the *ſecond*, This reſolves into a *quæſtio voluntatis:* What is the meaning of theſe words thrown into the *Tenendas* of a charter? It muſt be admitted, that they are ſometimes inſerted without any view to infer a liberation from a former aſtriction: and this is particularly to be preſumed when they are thrown in with a heap of other words, which have no particular view applicable to the circumſtances of the lands, and which plainly have been copied at random, as words of ſtyle. The meaning of the parties, which muſt decide this queſtion, is clearly diſcovered from the whole circumſtances of the caſe. The tenor of the clauſe founded on, which contains a great variety of the uſual words of ſtyle, without any meaning whatever, ſhows plainly, that it muſt have been copied from another charter, as words of courſe, and intended ſingly to give the vaſſal the lands, with all the advantages and privileges they formerly poſſeſſed; but not to

give them any new privilege, eſpecially ſo important a one as that here contended for. But what puts the matter out of doubt in this caſe, and demonſtrates that no ſuch thing could have been intended, is, the full evidence that has been brought of the conſtant immemorial poſſeſſion of this aſtriction recently after granting theſe charters, and as far back as the memory of man can go; and that too attended with circumſtances which never take place but in the ſtricteſt thirlage. The charter 1662, in which this clauſe is inſerted, is not granted in conſideration of any onerous cauſe given by the vaſſal to the ſuperior, for diſcharging the former aſtriction: and it will never be underſtood, that the ſuperior meant to diſcharge this ſervitude by theſe general words, or thereby to convey to the vaſſal a part of his rent, beſide contravening the warrandice he was under to the tenant of the mill, whom he was bound to ſecure in poſſeſſion of the multures, for which the rent was paid. It is further evident from the ſubmiſſion referred to, that there was no view of the vaſſal's being freed from the aſtriction to which his lands were formerly ſubject, elſe it would have been mentioned in the ſubmiſſion; and the arbiters ſigning witneſſes to the charter is a clear proof, that no more was tranſacted between the parties than what had been expreſsly ſubmitted to them. With regard to the clauſe in the precept of *Clare conſtat* in the 1714, it is evident, that it likewiſe muſt have been copied, *per incuriam*, from the former charter; as it cannot be imagined, that the Earl, after diſponing the mill, with the multures of theſe lands, *per expreſſum*, in the wadſet-right 1707, could mean to give away theſe multures to the vaſſal of the lands in a precept of *Clare conſtat*, when he was getting no conſideration for them. The authorities and deciſions quoted for the purſuer do not contradict what is here pleaded: on the contrary, they tend to illuſtrate it, and to confirm the rule laid down by Lord *Stair*, That a dubious clauſe of this kind ought to be conſtructed from the ſubſequent uniform conduct of the parties, the ſureſt evidence of their intention. And this rule the court again followed in a very late caſe, between the Duke of *Douglas* and Mr *James Baillie*, whoſe lands were found aſtricted, notwithſtanding a clauſe *cum molendinis et multuris* in the *Tenendas* of his charter, in reſpect of the immemorial uſe of grinding their corns at the Duke's mill, and paying inſucken multure. To the *third*, There was little occaſion to have recourſe to the plea of preſcription in this caſe, which is only neceſſary when a thirlage is impoſed *a non domino*. But here it was eſtabliſhed by the ancient proprietors of the lands, the family of *Bredalbane*, from whom the property devolved to the purſuer. The Earl's infefments in the barony and mill go back for ſeveral ages preceding the date of the wadſet-right, and are ſufficient titles of preſcription, founded upon the immemorial poſſeſſion of this ſervitude; and if preſcription was neceſſary, the years of it were run after the date of theſe infeftments, long before the wadſet was granted; ſo that there could be no objection either to the title, or the courſe of preſcription.

"The Lords found the lands aſtricted." G. C.

Act. *D. Græme.* Alt. *Ferguſon.*

N° CXXVII.

N° CXXVII. 21ſt *July* 1758.

CREDITORS of AUCHINBRECK,

AGAINST

RICHARD LOCKWOOD, Eſq; of *London*.

If an adjudger recovers partial payment out of a ſeparate ſubject, he can ſtill inſiſt to be ranked with the other creditors for the whole debt in his adjudication.

IN the ranking of the creditors of *Auchinbreck*, the intereſt produced for *Richard Lockwood* was two adjudications in 1737 and 1738, the accumulated ſums in which amounted to *L.* 1360 *Sterling*.

On the 30th *March* 1739, a partial payment of *L.* 340 *Sterling* of theſe debts was recovered, by arreſtment of certain funds belonging to the common debtor.

A queſtion from thence aroſe, Whether, in the ranking of the creditors, theſe two adjudications ſhould be ſtated to the full extent, ſo as to draw alongſt with the other creditors in proportion to that whole ſum? or, Whether the *L.* 340 ſhould be deducted, and the two adjudications ranked only for the remainder?

Pleaded for the other creditors, No creditor can claim from his debtor, or out of his eſtate, one farthing more than really remains due of his debt; every payment that is made by the debtor, or is recovered out of his effects, is an abſolute extinction of the debt *pro tanto*. After a debt is thus extinguiſhed and annihilated, it is difficult to conceive, by what rule of law or reaſon ſuch debt can be revived, or ſuppoſed to exiſt, in any ſenſe, or to any purpoſe whatever. An adjudication is a right in ſecurity; and, as every right in ſecurity is extinguiſhed *ipſo facto* by payment of the debt ſecured, by the ſame rule, a partial payment, as it diminiſhes the debt, ſo it proportionally diminiſhes the right in ſecurity; as an acceſſory cannot ſubſiſt without its principal. It is true, that an adjudication is a judicial diſpoſition of the lands in ſecurity of the debt; and that the whole adjudication remains as a ſecurity, till the laſt farthing of the debt is paid: but a judicial diſpoſition in ſecurity can be governed by no other principles, than a conventional or voluntary diſpoſition in ſecurity would be; that is, it muſt be quite dependent upon the debt ſecured. The governing rule, and the firm ground to fix upon, in this, and all the caſes that can be figured, is, That a right in ſecurity can never be one bit broader or narrower than the debt ſecured. Every variation in the laſt muſt affect the other in proportion: and although the right in ſecurity may remain over the whole lands, till the debt is fully paid, it will not follow, that it remains a ſecurity for the whole debt after the half of it is paid.

Anſwered for *Richard Lockwood*, As there is a deficiency in the fund for payment of the debts, Mr *Lockwood* can in no ſhape draw even what is juſtly due to him: ſo that the queſtion here truly comes to this, Whether the other creditors ſhall be intitled to a ſhare of what he

he recovered by his arreſtment out of a different ſubject? Becauſe, if the ſum ſo recovered ſhall diminiſh or reſtrict *pro tanto* his adjudication of the eſtate of *Auchinbreck*, it muſt enlarge the fund of the other creditors payment proportionally; by which means they would unjuſtly reap an equal benefit with himſelf from the diligence which he alone purſued.

As an adjudication is a judicial diſpoſition of the lands in ſecurity, redeemable within the legal, upon payment of the whole accumulated ſum, principal and intereſt; therefore the laſt farthing of the debt, as well as the firſt, has the whole adjudication for its ſecurity and payment: *Unaquæque gleba ſervit.* Hence it is an eſtabliſhed principle in the law, That if any part of the ſum remains due when the legal of the adjudication expires, although the adjudger may have received nineteen twentieth parts of his debt, the whole lands adjudged become nevertheleſs the property of the adjudger, and his right is not reſtricted to ſuch a proportion of the lands adjudged as may correſpond to the ſum that remains truly due when the legal expires. The ſecurity does not diminiſh as the debt diminiſhes, but remains invariable over the whole ground, until the whole debt is extinguiſhed. And it is upon the ſame principle, that if different eſtates, belonging to the ſame perſon, or to different perſons, are adjudged for one and the ſame debt, the adjudger will be ranked for his whole ſum upon each eſtate; and what he draws out of the one, will not reſtrict his ſecurity upon the other, though he cannot draw out of the two more than his juſt debt. While, therefore, any part of the debt in queſtion remains unpaid, it falls to be ranked to its full extent. And ſo this caſe was ſolemnly decided in expreſs terms in 1734, Earl of *Loudon* againſt Lord *Roſs*, *Dict. Deciſions, vol. 2. p. 355.*

"The Lords ſeemed chiefly to be moved by the precedent in 1734, "above quoted, and a deſire to preſerve an uniformity in their deci- "ſions in a point of general conſequence; and,

"Found, That the partial payment did not reſtrict the adjudications, "but that the ſame muſt be ranked for the whole accumulated "ſums therein contained, till what remains due be paid." G. C.

Act. *And. Pringle.* Alt. *Lockhart.* Clerk, *Kirkpatrick.*

N° CXXVIII. 22d *July* 1758.

ANNE ROSS, and WILLIAM WALLACE writer,

AGAINST

THOMAS CLEGHORN, and the Incorporation of TAILORS of PORTSBURGH.

A ſummons, by being called in the outer houſe by the clerk, becomes a depending proceſs.

ANne *Roſs* raiſed a ſummons for payment of a debt againſt Lady *Earlſhall*, which was executed upon the 2d of *Auguſt* 1721. This ſummons

ſummons, after the days of compearance were elapſed, was called in the outer houſe in the uſual form by the clerk, and the calling marked on the margin thus: "3d *February* 1722. *Actor*, Irving, *Alter*. Boſwel. "To ſee."

Anne Roſs raiſed inhibition on this ſummons, in order to attach the lands of *King's ſtables*, then the property of Lady *Earlſhall*, which was executed on the 22d *Auguſt* 1721, and recorded the 7th *September* thereafter.

This ſummons was neglected for twenty-four years; after which *Anne Roſs*, and *William Wallace* her aſſignee, raiſed a wakening and transference againſt the Lady *Earlſhall*'s three daughters; and added a concluſion of reduction *ex capite inhibitionis* of a diſpoſition of the lands of *King's ſtables*, by Lady *Earlſhall*, to *David Bruce-Baillie*, in 1724, and the ſervice of *Robert Baillie*, as heir to him, in 1725, with infeftments, and other writs following thereon. Before this time *Robert Baillie* had ſold the lands to *Thomas Cleghorn* and the incorporation of tailors.

Anne Roſs obtained a decreet *cognitionis cauſa*, the three daughters having renounced, and afterwards an adjudication of the lands of *King's ſtables*, for payment of her debt; and inſiſted in a proceſs of mails and duties, in which *Thomas Cleghorn*, and the incorporation of tailors of *Portsburgh*, purchaſers by progreſs from Lady *Earlſhall*, appeared, and *pleaded* a preference on their prior infeftments.

Anne Roſs replied, That the inhibition executed upon her depending proceſs in *Auguſt* 1721, was prior to the defender's rights; and therefore a ſufficient ground for reducing them.

Objected for the defender, to the purſuer's inhibition, That the ſummons on which the inhibition was raiſed had expired by the elapſe of year and day without any judicial proceedings, or debate following upon it; and if the ſummons expired, the inhibition muſt fall with it; as was found in the year 1743, *James Robertſon* brewer in *Edinburgh* againſt Mr *Alexander Macmillan*.

Anſwered, The ſummons, by being called in the outer houſe by the clerk, became a judicial proceeding, and a depending proceſs: for, anciently, the firſt calling of ſummonſes in the outer houſe was in preſence of a judge, as is the practice ſtill in the inferior courts; and though in fact the judge is not now preſent at theſe callings, yet his preſence is preſumed; and this is to be conſidered as the firſt judicial ſtep upon every ſummons; and is agreeable to the authority of Lord *Stair*, *book* 4. *tit.* 2. § 3. and the obvious conſtruction of the act of ſederunt 26th *February* 1718.

"The Lords found, That the ſummons, by being called in the "outer houſe, became a judicial proceeding, and could be after- "wards wakened and inſiſted in; and therefore repelled the ob- "jection." W. J.

Act. *Garden*. Alt. *Ferguſon*.

N° CXXIX. 28th *July* 1758.

WILLIAM Earl of HOME,

AGAINST

The OFFICERS of STATE.

The crown's acquiſition of a right of patronage by the poſitive preſcription.

IN 1403, *Alexander Home* of that Ilk, the Earl of *Home*'s predeceſſor, founded the provoſtry of *Dunglas*; and that foundation was confirmed by a charter under the great ſeal in 1450; and ſince that period, the patronage of the provoſtry, and prebendaries thereto belonging, was carried down in all the title-deeds of the family.

[illegible]*lliam* Earl of *Douglas*, in 1451, diſponed the pariſh-kirk of *Hutton* to the college-kirk of *Dunglas*, and the patronage thereof to the ſaid *Alexander Home*, and his heirs and aſſignees. This grant was confirmed by a charter under the great ſeal in 1458.

In 1565, the Archbiſhop of *St Andrew's* granted a collation to Mr *John Home*, upon Lord *Home*'s preſentation, of the ſaid provoſtry of *Dunglas*, proceeding upon the recital of the ſame being vacant, with all its parts and pertinents, *viz. Eccleſia parochialis de Hutton, nempe, rectoria et vicaria perpetua ejuſdem, &c.*

Some time before the 1614, the pariſh of *Hutton* was united with the pariſh of *Fiſhwick*, whereof the patronage belonged to the crown.

In 1614, Mr *Allan Lundie* was preſented by the crown to be miniſter of the united pariſhes.

In 1636, the crown preſented Mr *James Lundie* to the united pariſhes. He was afterwards depoſed, and his depoſition was approved by the aſſembly 1649.

In 1644 the provoſt and prebendaries of *Dunglas*, and *James* Earl of *Home* as patron thereof, granted procuratory for ſurrendering the ſaid college-kirk, and right of patronage thereof, together with all lands and patronages of kirks thereto belonging, in the hands of his Majeſty, to the effect the name of the ſaid college-kirk might be *ſimpliciter* ſuppreſſed, and that his Majeſty might give and diſpone the ſame in manner therein mentioned. An application was thereupon made to parliament; and the eſtates of parliament, on the 29th *July* 1644, paſſed an act, ratifying and approving of the ſaid procuratory, and ordaining a charter and infeftment to be granted under the great ſeal, diſponing to the ſaid Earl of *Home*, and his heirs-male, heritably, all lands, teinds, and *right of patronages*, which pertained of old to the ſaid college-kirk, *viz. the patronage of the pariſh-kirk of Hutton, &c.* containing an union of the haill lands, to be called the *barony of Upſettlington.* It did not however appear, that any charter was actually expede on this act of parliament.

From that time, as patronages were aboliſhed, the kirk of the foreſaid united pariſhes was poſſeſſed by miniſters who entered upon calls, till

till 1679, when the crown preſented Mr *James Orr*, who ſurvived the next abolition of patronages in 1690.

After Mr *Orr*'s death Mr *Gilbert Laurie* was admitted on a call, and continued till his death in 1728; when a preſentation was granted by the crown, and another by the Earl of *Home*, to Mr *Robert Waugh*, who was ſettled. He applied to and got a gift from the crown of two and a half year's vacant ſtipend, which he uplifted accordingly.

Upon Mr *Waugh*'s death, the Earl of *Home* purſued a declarator of his right to the patronage of *Hutton*, and of his having thereby a joint right with the crown to the patronages of the united pariſhes of *Hutton* and *Fiſhwick*. To this proceſs he called the officers of ſtate as defenders in behalf of the crown; and they accordingly appeared, and *maintained*, That the crown had acquired the ſole right to the patronage of *Hutton* as well as *Fiſhwick*, by the poſitive preſcription.

Anſwered for the purſuer, 1*mo*, The poſitive preſcription does not apply to rights of patronage, which, by their nature, do not admit of that continued poſſeſſion which preſcription eſſentially requires. It is the negligence of the proprietor which juſtifies ſuch an acquiſition of property to another. Now, a patron has no proper poſſeſſion, but rather a right to exerciſe a power at ſuch periods as a vacancy occurs. Suppoſe, on a vacancy, the true patron neglects his right, and another perſon gives a preſentation in favour of one who is admitted, and lives above forty years thereafter, the true patron has no method to repair his error, or acceſs to aſſert his right during the common years of preſcription. Thus, if preſcription operated in ſuch a caſe, he might be ſtripped of his right by the incroachment of another in one ſingle act, which would be extremely hard.

2*do*, Suppoſing the preſcription to apply, yet the crown has here no ſufficient title to acquire this patronage by it. The foundation of patronages depends on endowment, which may originally have been made by a ſubject, as well as by the King. The crown's preſumptive title to all lands to which ſome other does not ſhow a right, does therefore not extend to patronages. All lands muſt be derived from the crown originally; but patronages may have come from a ſubject. At any rate, *præſumptio cedit veritati*; and as here it appears the crown was once denuded of the patronage, or had acknowledged the right to be in another, the preſumptive title muſt fly off, and cannot be revived by mere poſſeſſion, without a new title to found it. And,

3*tio*, Were the title of the crown ſufficient, yet there has been no ſufficient poſſeſſion upon it for acquiring this right.—After the union of the two pariſhes, the patrons were intitled to preſent *per vices*. The crown was therefore intitled to preſent Mr *Lundie* in 1614, being the firſt *vice*. The ſame was the caſe as to the third preſentation of Mr *Orr* in 1679. The poſſeſſion of theſe two preſentees, and the thirty years before the 1679, when the poſſeſſion was held without any preſentation, muſt be laid aſide. — The only poſſeſſion, therefore, on which the crown can found, is that of Mr *James Lundie*, the ſecond preſentee, who only poſſeſſed for about thirteen years, which is far ſhort of preſcription; and during that period, the Earl's predeceſſor aſſerted his right in the moſt public manner, by obtaining the act of parliament 1644, whereby a new grant of the patronage was ordered to be made to him. The acts of that parliament were indeed reſcinded after the reſtoration; but the

reſciſſory

reſciſſory act 1661 contains a declaration, That all acts, rights, *&c.* in favour of any particular perſons, paſſed in the pretended parliaments, ſhould *ſtand good and valid* until taken into further conſideration: And at any rate, the obtaining ſuch an act in the 1644 was a ſolemn document taken on the Earl's right, ſufficient to interrupt preſcription.—Further, as Mr *Orr*'s poſſeſſion after the 1679 cannot be preſumed to have been *unlawful*, when it can admit of a *lawful* conſtruction, as founded on the crown's right to the patronage of *Fiſhwick*, there was no preſcription run before the abolition of patronages in 1690; and the ſubſequent ſettlement, on a call, cannot affect the Earl, nor that of Mr *Waugh* in 1728, as the Earl, as well as the crown, preſented him.—Upon the whole, therefore, the crown has no continued poſſeſſion for forty years; and conſequently the Earl's right ſtill ſtands good.

Replied for the crown, 1*mo*, The act 1617 extends to all heritable rights whatever. Although it ſpeaks of ſubjects which paſs by *charter and infeftment*, yet it has always been explained to comprehend tacks and other ſuch rights, conſtituted without infeftment. Upon the ſame principle, it has been underſtood to extend to patronages, *Stair*, *lib.* 2. *tit.* 12. § 23.—Few rights admit of a poſſeſſion that can be exerciſed every moment of the forty years; it is ſufficient, if they are ſuch as can be exerciſed occaſionally within that ſpace. Thus a fiſhing is not daily exerciſed; yet a right thereto, or to a road to a church, or a burial-place, may certainly be acquired by preſcription. Beſides, there are other rights belonging to patrons, as well as the power of preſentation, which may be exerciſed while the benefice is full; and the conſequences of debarring the force of preſcription as to ſuch rights, would be fatal to many.

2*do*, The Sovereign, *jure coronæ*, has certainly a right to poſſeſs all patronages to which no other perſon can inſtruct a title. The title for preſcription by a private perſon, in acquiring lands, is charter and ſeiſin; becauſe that gives him right to poſſeſs: but as the crown needs not an infeftment, the *jus coronæ* muſt be a ſufficient title, by the nature of the thing, for acquiring a patronage, upon the ſame principle that a perſon poſſeſſing on a long tack for forty years, is allowed the benefit of the poſitive preſcription without infeftment. After poſſeſſion had upon the *jus coronæ* for the years of preſcription, every deed and title which is ſet up againſt the right thus eſtabliſhed, muſt be held, in the eye of law, to be *falſe and forged*, agreeable to the act 1617. And,

3*tio*, It is evident, that from the 1614, down at leaſt to the 1728, the crown *only* preſented upon every occaſion that offered; and no evidence is produced of the family of *Home* having *ever* preſented to this pariſh during that time; ſo that the crown's poſſeſſion is *immemorial*. Again, it does not appear when the two pariſhes were united; conſequently it is not certain that the preſentation 1614 was given in the right of *Fiſhwick*. But ſuppoſing it was, the preſentation in 1636 was confeſſedly in right of *Hutton*; ſo on the vacancy 1649 the *vice* belonged to *Fiſhwick*; and of courſe that in 1679 belonged to *Hutton*. Hence it follows, that this laſt ſettlement was another direct act of poſſeſſion by the crown. In the ſame manner, the right of preſentation in 1693 belonged to *Fiſhwick*, and in 1728 to *Hutton*; when the crown not only preſented, but diſpoſed of the vacant ſtipend: for although, by the acts of parliament 1649 and 1690, the right of preſentation

ſentation was taken away, yet the right of patronage, in other reſpects, ſtill continued; and conſequently in *vice* patronages, the patron who was deprived of his right of preſenting by the public law, could not, upon reſtoration of that right, incroach upon the privilege of the other patron, by claiming the *vice* which did not belong to him. Now, where poſſeſſion of the patronage once commenced, preſcription continued to run, notwithſtanding thoſe ſtatutes by which the right of preſentation was for ſome time taken away; and that preſcription muſt neceſſarily eſtabliſh the right unleſs interrupted. The act 1644 could have no ſuch effect, as paſſed in an aſſembly held againſt the will of the Sovereign, where he could not be preſumed preſent, and where, therefore, the proceedings in ſuch a matter could not be conſidered as a document taken againſt the crown, or have more force than a private proteſt. The exception in the reſciſſory act 1661 does not apply to this caſe, as it related only to rights and ſecurities granted to private perſons; whereas here no right or ſecurity was granted to the Earl in 1644, as no charter paſſed upon the act, which was at beſt only a ſimple ratification of the procuratory of reſignation, and ſuch ratifications, even in lawful parliaments, paſſed *periculo petentium, et ſalvo jure cujuſlibet.* Nor can the preſentation granted by Lord *Home* in 1728 be conſidered as an interruption, unleſs it could be ſaid, that the preſentee was ſettled in conſequence thereof, and not upon the crown's preſentation, which is proved to have been the caſe, by Mr *Waugh*'s obtaining the gift of the vacant ſtipends from the crown.

It appeared to be the opinion of the court, 1*mo*, That where no private perſon can ſhow a right to a patronage, it is preſumed to belong to the crown. And, 2*do*, That the act 1617 extends to patronages in ſo far as they may be acquired by the poſitive preſcription. But ſome of the judges doubted as to this ſecond point. By the firſt interlocutor the crown was preferred to the patronage in queſtion; but on adviſing a reclaiming petition, and anſwers, the deciſion was altered, as it ſeemed chiefly in reſpect of the act 1644 being conſidered as an interruption, and of the crown's poſſeſſion in the *vice* of *Hutton* not being of ſufficient length for completing the preſcription.

" The Lords preferred the Earl of *Home* to the patronage of *Hut-*
" *ton.*" D. R.

Act. *Lockhart, Ferguſon.* Alt. *A. Pringle, Advocatus.* Reporter, *Woodhall.*

N° CXXX. 31ſt *July* 1758.

JAMES FERGUSON,

AGAINST

WILLIAM BLAIR in *Nether Shannoch-hill.*

The drawer's name may be filled up in a bill kept in his own cuſtody, at any time before it is produced in judgment.

James Ferguſon brought an action againſt *William Blair* upon a bill of the following tenor. " *Down, January* 31. 1744. Gentlemen,

" Againſt

" Againſt the term of *Candlemas* 1745 pay, conjunctly, to me or order, " in the dwelling-houſe of *John Moir* ſteward-clerk of *Monteith*, the " ſum of five hundred and twenty-five merks *Scots*, value of JAMES " FERGUSON.—— To *Robert Campbell* of *Torry*, and *William Blair* in *Ne-* " *ther Shannoch-hill*, conjunctly and ſeverally. Accepts ROBERT CAMP- " BELL. Accepts WILLIAM BLAIR."

The words JAMES FERGUSON were evidently wrote with a different ink from the other parts of this bill.

It was *objected* by the defender, That this bill was void and null, for that the name of *James Ferguſon*, as drawer, was not adhibited to it till the intenting of this proceſs. That by the act 1696, " it is de- " clared, That, for thereafter, no bonds, aſſignations, diſpoſitions, *or other* " *deeds*, be ſubſcribed blank in the perſon or perſons names, in whoſe " favour they are conceived; and that the foreſaid perſon or perſons be " inſert before or at ſubſcribing, or at leaſt in preſence of the ſame " witneſſes who are witneſſes to the ſubſcribing, before delivery." This act was found to extend to bills, 9th *February* 1711, *Brand*; and the time of inſerting the drawer's name, in the caſe of bills, which require no witneſſes, muſt neceſſarily be either before or at ſubſcribing. In the caſe of *Walkinſhaw contra Campbell*, 8th *January* 1730, a bill taken payable to the bearer, was found null upon this ſtatute; and in a very late caſe, *Douglas* and *Hood contra Logan*, 9th *November* 1748, a bill was found null for want of the drawer's ſubſcription.

Anſwered, The bill in queſtion remained always in the cuſtody of *James Ferguſon* the drawer, to whom it was originally delivered, and was ſubſcribed by him before it was produced in judgment. Although the act 1696 ſhould be underſtood to apply to bills, yet that would not annul the bill in queſtion; for, in practice, it has always been held ſufficient, that the drawer's name be filled up before the bill is produced in judgment. This is an indulgence allowed in conſequence of the uſual practice in commercial tranſactions, that the drawer often delays to adhibit his ſubſcription till he comes to make uſe of the bill. And this does not occaſion that ſort of confuſion which it was the purpoſe of the act 1696, by prohibiting blank writs, to prevent; for it is not the practice to transfer theſe blank bills to other perſons, who may fill up their name as drawer, becauſe the facility of indorſation renders that method altogether unneceſſary: and therefore it would be hurtful to commerce, without being attended with the benefit which the act 1696 propoſed, if bills were found null where-ever the drawer's name was not adhibited before or at ſubſcribing. This conſtruction of the act of parliament has been eſtabliſhed by ſeveral deciſions; and was firſt introduced by a deciſion 27th *July* 1738, *Henderſon contra Davidſon*, obſerved in the Dictionary of deciſions; and afterwards confirmed by a later deciſion, 25th *November* 1748, *Æneas Cathcart contra Henderſon*, where the Lords repelled the objection to a bill, That it was ſigned by the drawer after the death, not only of the debtor, but of the creditor in the bill, to whom it was made payable; upon this medium, That it had been ſigned by the drawer before it was produced in judgment, and had been in poſſeſſion of the drawer, from its date, for the creditor's behoof.

" The Lords repelled the objection to the bill." W. J.

Act. *Johnſtone*. Alt. *Will. Grahame*.

N° CXXXI.

N° CXXXI. 2d *Auguſt* 1758.

CHILDREN of DUNCAN FISHER,

AGAINST

Their TUTORS and CURATORS.

Quorum of tutors and curators.

Duncan Fiſher executed a nomination of tutors and curators to his children, in the following terms: "I do nominate and appoint "*James Fiſher*, my father, *Margaret Macneil*, my ſpouſe, during the "widowity of the ſaid *Margaret Macneil*, allenarly; *and failing them by* "*death*, *Donald Macneil* of *Collonſay*, *Angus* and *Alexander Macneils*, "*James Campbell* writer, *James Campbell* of *Oib*, *James Campbell* of *Raſ-* "*chilly*, *any two of them being a quorum*, tutors and curators to *Angus*, "*James*, and *Barbara Fiſhers*, my children, *&c.* with full power to "them, or their ſaid quorum, to manage my ſaid *children their per-* "*ſons and eſtate*," &c.

Duncan Fiſher having died, and alſo *James Fiſher*, who, with the wife, was named tutor in the firſt place, a queſtion occurred, Whether, by the death of *James*, the firſt nomination was vacated, ſo as to make place for the ſecond nomination? or, Whether, on the other hand, the wife was intitled, under the firſt nomination, to act alone?

"The Lords found, That the firſt nomination of tutors and cura- "tors has not failed by the death of *James Fiſher*." W. J.

Reporter, *Colſton.*

N° CXXXII. 3d *Auguſt* 1758.

JAMES ANGUS writer in *Dunſe*,

AGAINST

The REPRESENTATIVES of JAMES WEMYSS, late clerk of the poſt-office at *Edinburgh*.

Bankruptcy of the husband not relevant to reduce a marriage-contract, after the death of the wife, and failure of the iſſue of the marriage.

BY contract of marriage between *Patrick Lindſay* tenant in *Weſter Deanshouſes*, and deputy wardrobe-keeper of the palace of *Holyrood-houſe*, and *Margaret Wemyſs*, dated 22d *February* 1742, *James Wemyſs*, her father, became bound to pay to *Patrick Lindſay*, *his heirs or aſſignees*, the ſum of *L.* 300 *Sterling*, in name of tocher. Of that ſum, *L.* 50 was made payable at *Whitſunday* 1742, *L.* 50 at *Martinmas* thereafter, *L.* 50 at *Whitſunday*, and *L.* 50 at *Martinmas* 1743, and the remaining

maining *L.* 100 at the firſt term after Mr *Wemyſs*'s deceaſe. On the other part, *Lindſay* became bound to provide the like ſum of *L.* 300, and to ſecure the ſame, with the ſaid portion, to himſelf, and his future ſpouſe, in liferent, and the children of the marriage, in fee; and in caſe of no children, he obliged himſelf, and his heirs, to pay *L.* 100 *Sterling*, being the laſt moiety of the tocher, to his wife, or any perſon to whom ſhe ſhould aſſign the ſame; under a proviſo, That in caſe ſhe ſhould not execute that power of diſpoſal, the obligation upon him as to this laſt *L.* 100 ſhould determine.

In purſuance of this contract, the two firſt moities of the portion, making *L.* 100 *Sterling*, were paid by Mr *Wemyſs* to Mr *Lindſay*. *James Angus* being creditor to *Lindſay* in a ſmall debt, uſed arreſtment in *Wemyſs*'s hands, before any more payments were made; and ſoon after, *Lindſay* granted an aſſignation to *Angus* of the *L.* 50 *Sterling* due at *Whitſunday*, and the other *L.* 50 of the portion due at *Martinmas* 1743, which was acknowledged to be in ſecurity of *Angus*'s own debt, and of ſome other debts due by *Lindſay*, in which *Angus* was truſtee.

In *July* 1743, *James Angus* charged Mr *Wemyſs* with horning for payment of the ſums aſſigned; upon which *Wemyſs* obtained a ſuſpenſion, which for ſeveral years lay over undiſcuſſed. — In the mean time, *Patrick Lindſay* joined in the rebellion, and was convicted and executed at *Carliſle* in the 1746. His wife ſurvived him for ſome years, as did alſo the only child of the marriage; but both died before the ſuſpenſion was wakened: and Mr *Wemyſs* having alſo died, an action was at length inſiſted in againſt his repreſentatives.

The chief defence ſtated for them, was, That *Patrick Lindſay* had never implemented the obligations upon him, contained in the marriage-contract; and that he was even *obæratus* and bankrupt at the time of entering into the contract, which ought therefore to be ſet aſide *ex capite fraudis*. The parties differed as to the fact of his bankruptcy, or inſolvency; but the debate turned upon the relevancy of the defence, before any proof was allowed.

Pleaded for the defenders, 1*mo*, In mutual contracts, where the obligation preſtable by the one party is the cauſe of what is preſtable by the other, neither of them can maintain an action for implement of what is preſtable to them, without performing their part of the contract. The Civil law was expreſs upon this point; and the ſame is the opinion of Lord *Stair*, title, *Obligations conventional*. Nor is there any difference in this reſpect between articles of marriage and other contracts. The principles of law and juſtice are the ſame in both; and ſo this point has been determined in a variety of caſes collected in the *Dictionary*, title, *Mutual contract*; particularly in the caſe of the creditors of *Watſon contra Cameron*, 4th *July* 1732. The huſband's inability to perform, ought therefore to operate a total diſſolution of the contract. Nor can this exception be removed by the ſupervening death of the wife, and child of the marriage; for if no action would have lien for the portion while they were living, there is no good reaſon, why it ſhould do ſo after they are dead, ſeeing the contract on the huſband's part is ſtill not implemented. And,

2*do*, The defence does not reſt merely on the huſband's inability to perform; it reſolves into a reduction of the contract on the head of fraud. The bride and her father were *dolo inducti* to enter into this

contract,

contract, upon the faith and belief, that *Patrick Lindſay* was then in condition to perform what he undertook; whereas, at that time, he knew himſelf to be utterly inſolvent, and for a number of years had been diſtreſſed by captions and other diligence; upon ſome of which he was apprehended, and on others abſconded. *Dolus dans cauſam contractui*, is relevant to reduce the contract *in totum*. In the late caſe between *Carſin* and the aſſignee of *William Telfer*, a proof of fraud was allowed, for reducing a marriage-contract, after the marriage had diſſolved by the predeceaſe of the wife without iſſue; and though judgment eventually went in favour of the aſſignee of the huſband, it did ſo, in reſpect that *Carſin* failed in proving the fraud. A proof of the bankruptcy ſhould therefore be allowed here, as relevant to reduce the contract, as fraudulent on the part of the huſband.

Anſwered for the purſuer, 1*mo*, It is juſt, that, in common contracts, where the obligation on the one party is the mutual cauſe of what is preſtable by the other, neither of them can maintain an action for implement to them, without performing their own part of the contract. But marriage-contracts are attended with different circumſtances. In common caſes, a contract can be reduced, and parties reſtored *in integrum*; but that cannot be done after marriage has followed on a nuptial contract. Again, in marriage-contracts, the mutual preſtations are not the adequate cauſes of each other. The marriage is properly the cauſe of all the ſtipulations on either ſide, which are only conventional ſettlements in place of the legal rights ariſing from marriage. A man may provide his wife, though ſhe brings no portion; and the wife's want of it will not prejudice her legal rights. A contract of marriage is not like a bargain of ſale, that cannot ſubſiſt without a price, the marriage itſelf being an onerous cauſe for the whole proviſions. The greateſt length therefore that deciſions have gone as to ſuch contracts, is to allow retention of the portion on the part of the wife, while any condition remains to be performed on the part of the huſband. Beſides, in all thoſe caſes, either the wife was living at the time, or at leaſt children of the marriage, who were creditors by the contract in their proviſions; and even in ſome inſtances of that kind, the huſband's creditors have been nevertheleſs preferred, as in the caſe of *Margaret Turnbull*, 25th *November* 1709. But in no caſe has the huſband's inability to perform been ſuſtained to reduce the contract totally; which would be of the moſt dangerous conſequence. Here, after neither the wife nor iſſue of the marriage exiſt, there is no room for any challenge on that head; nor even for retention, which requires a *jus crediti* in the uſer of it, to compel the other party to perform. The wife or children had the only intereſt to force the huſband to implement, as the proviſions made by him were in their favour; and, upon their failure, the conditions on his part became of courſe impreſtable; and, conſequently, the defenders have no title or intereſt now to object, that he was not able to perform a condition which has already evaniſhed.

And, 2*do*, There was no fraud upon Mr *Lindſay*'s part in this contract, nor was he inſolvent at entering into it. But ſuppoſing him to have been ſo, that will not infer fraud, which is not to be preſumed. It is the intereſt of this country, as a commercial nation, that exact proportion or equality in marriages ſhould not be required; and nothing is more diſcouraging to merit, than to prohibit any man from

getting more money with a wife than he is poſſeſſed of in his own right. If the huſband here had not had a ſhilling of his own, yet as he was a gentleman, the portion of *L.* 300 was but a moderate proviſion from his wife's father, ſince he was to have the burden of maintaining the wife and children in a ſuitable manner. Beſides, every man may be allowed to hope for an acquiſition during his marriage of more than the ſum in queſtion. The huſband is taken bound to provide and ſecure a certain fund for ſupport of his wife and children, in the event of his deceaſe; but he is confined to no ſhort day for ſo doing. He is left at freedom to acquire ſuch fund, and ſettle it at any time during the marriage; and if by accident or misfortune, his endeavours are fruſtrated, it would be extremely hard to preſume him a rogue from the beginning. Moreover, the objection, if good, would go too far; for, if inſolvency on the part of the huſband could preſume fraud, and totally void the contract, ſo muſt it do if it occurred on the part of the wife's father, or the provider of the portion. The conſequence of this would be, that all proviſions in marriage-contracts would be thrown looſe. A huſband could not be ſure of the portion, a wife of her jointure, or children of their proviſions: and theſe were the grounds of the deciſion in the caſe of *Carſin*, though a proof was there at firſt allowed *before anſwer*.

" The Lords repelled the defence founded on the allegation, That " the ſaid *Patrick Lindſay*, at the date of the contract of marriage, " was *obæratus* and bankrupt, and ſo not able to have implement- " ed his part of the contract; and that in reſpect of the death of " the wife, and of there being no iſſue of the marriage exiſting; " and refuſed to allow a proof of Mr *Lindſay*'s circumſtances." D. R.

Act. *Dav. Rae.* Alt. *Lockhart.*

N° CXXXIII. *Auguſt* 1758.

DAVID BAIRD,

AGAINST

JOHN JAP and his CREDITORS.

A ſeller preferred to the creditors of the buyer, where he retained the diſpoſition of the ſubject for ſecurity of the price.

IN *November* 1755, *John Jap* purchaſed from *David Baird* a houſe in *Preſtonpans*, at the price of *L.* 115 *Sterling*. *Jap* granted bond for the price, and immediately entered to the poſſeſſion of the houſe. But *Baird* retained poſſeſſion of the diſpoſition and writings, and only delivered to *Jap* an inventory, with a docket, bearing, That it was an inventory of the progreſs of the houſe in *Preſtonpans*, ſold by him to *Jap*; and at the ſame time delivered a letter, reciting the bargain, and obliging himſelf to deliver up the progreſs and diſpoſition upon *Jap*'s making payment to him of the price for which he had granted bond.

Baird received payment of ſome annualrents upon the bond; and *Jap*'s

Jap's affairs having gone into diſorder, *Baird* brought an action againſt him, to have it found and declared, That he ought either to pay up the price, or give up the poſſeſſion of the houſe, and pay rent for the time he had enjoyed it, upon getting allowance of what he had paid of annualrents upon the bond.

Jap and his creditors *inſiſted*, That this ſale was completed, and could not be reduced for not payment of the price; for that here *Jap*'s bond was taken for the money, and he immediately let into poſſeſſion, and a diſpoſition actually ſigned in his favour, and annualrent received upon his bond. Nor could it have any effect, that the diſpoſition was retained as a ſecurity for the price. This could not afford any real lien on the ſubject, nor prevent the bargain from having its full effect.

Anſwered, 1*ſt*, *Jap* himſelf cannot keep poſſeſſion of the houſe while he refuſes to make payment of the price; and therefore *Baird* muſt prevail in his declarator in a queſtion with him. 2*dly*, With reſpect to the creditors of *Jap*, it is a principle of law, That, in a ſale, the property is not transferred *donec pretium ſolvatur, vel fides habita ſit de pretio*. In this caſe, the price was neither paid, nor did *Baird* rely for it upon the ſecurity of *Jap*; but, on the contrary, retained the diſpoſition, and alſo the rights of the ſubject, as a farther ſecurity. This was a condition ſuſpenſive of the ſale, which either prevented the property from being transferred, or was ſufficient to reſolve the contract upon failure: and though he had received not only annualrents on the bond, but the greateſt part of the price; yet the conditions could not be fulfilled without payment of the whole.

And, at any rate, the creditors of *Jap*, who have not affected this ſubject by legal diligence, have no title to oppoſe this declarator. If they had a title, they could only proceed by calling *Baird* in an action for delivery of the writings; which he would be intitled to refuſe till payment of the price for ſecurity of which he retained them; and this is exactly what *Baird* now inſiſts for.

" The Lords found, That *Baird*, in reſpect he never delivered the " diſpoſition, is intitled to the houſe, or to the price." W. J.

Act. *Nairne*. Alt. *Hew Dalrymple*. Reporter, Lord *Nisbet*.

N° CXXXIV. *Auguſt* 1758.

JANET BUCHANAN,

AGAINST

ALEXANDER BUCHANAN of *Auchmar*.

A reſerved faculty of burdening an eſtate, contained in a diſpoſition by a father to a ſon, found capable of being exerciſed gratuitouſly, and on deathbed.

BY contract of marriage, dated in 1696, between *William Buchanan*, with conſent of his father *John Buchanan* of *Auchmar*, and *Jean Buchanan*, *John* the father diſponed to *William* his ſon, and the heirs-male

male to be procreated of that marriage, whom failing, to the heirs-male of *William* of any other marriage, the lands of *Auchmar*.

Of this marriage there were born three ſons and three daughters, *viz. John*, *Alexander*, *Bernard*, *Janet*, *Katharine*, and *Helen*.

The ſaid *William Buchanan* did, in 1735, in implement of the marriage-contract, diſpone to his eldeſt ſon *John*, and the heirs-male of his body; whom failing, to his ſecond ſon *Alexander*, *&c.* his eſtate of *Auchmar*, yielding about 2000 merks of yearly rent; but under ſundry conditions and reſervations; particularly, That *John*, by his acceptation thereof, ſhould be bound to pay the granter's debts, conform to a liſt to be ſigned by him; "And by and attour the ſaid liſt of "debts, reſerving full power and liberty to me to burden and affect "the lands, *&c.* above diſponed, to the extent of *L.* 100 *Sterling*, "and to grant ſecurity therefor, heritable or moveable, in favour of "ſuch perſon or perſons as I ſhall think fit." An annuity of 600 merks was likewiſe thereby reſerved to the father; and *John* was alſo taken bound to pay the younger children 5000 merks.

William Buchanan afterwards divided the 5000 merks among his younger children, which was accordingly paid to them. *John* the eldeſt ſon entered to poſſeſſion of the eſtate, under the title of that diſpoſition, and held the ſame till his death, which happened in the 1744; when *Alexander* the ſecond ſon ſucceeded, and entered to poſſeſs upon the ſame title. *William* the father was yet alive: In *December* 1746 he aſſigned to his daughter *Janet* his moveables, and arrears of his annuity; and in *January* 1747 he granted a deed in her favour, proceeding on a recital of the reſerved faculty of burdening the eſtate with *L.* 100, contained in the foreſaid diſpoſition, and, in exerciſe thereof, obliging himſelf and his ſon *Alexander* to pay that ſum to her, over and above her former proviſions; *proviſo*, That *Janet* ſhould pay the one half of the *L.* 100 to her ſiſters *Katharine* and *Helen*.

William Buchanan died within thirty days of the time of granting this laſt deed, and had before contracted the illneſs of which he died.

Janet brought a proceſs againſt her brother *Alexander* for payment of her proviſions, particularly of the ſaid *L.* 100 *Sterling*.

Objected by the defender, 1*mo*, The reſerved faculty gave no power to the father to burthen the eſtate *gratuitouſly*. The diſpoſition bore to be in implement of his marriage-contract, by which the eſtate was already provided to the heir of the marriage; and a diſpoſition with a reſerved power to burden *gratuitouſly* could not have been implement of that proviſion. Neither was the faculty intended for enabling his father to beſtow ſuch a ſum on any of his younger children, as they were provided for in ſeparate clauſes of the deed. The true intention of the reſervation was only to enable the father to contract a further ſum of *L.* 100 of debt, if neceſſary, over and above thoſe debts which he had already contracted, and which the ſon was bound to pay for him.

2*do*, Suppoſing the faculty might have been *gratuitouſly* exerciſed, yet it could not be done by the father upon *deathbed*. For although a man diſponing his eſtate to a ſtranger, and reſerving to himſelf ſuch a faculty, may exerciſe it at any time; yet where the diſponee is his ſon and heir, as in this caſe, to whom he is under an antecedent obligation to give his eſtate, the ſon, notwithſtanding the diſpoſition, will

ſtill

ſtill be underſtood to be heir, and as ſuch have the privilege of reducing any deed made to his prejudice upon deathbed; more eſpecially as here the clauſe does not bear expreſsly, that the faculty might be exerciſed *etiam in articulo mortis.*

Anſwered for the purſuer, 1*mo*, The diſpoſition was more than ſufficient implement of the contract, though with a reſerved power of burdening *gratuitouſly* to the extent of *L.* 100: for notwithſtanding the contract, the father might have contracted debts to any extent, or ſpent every ſhilling of the eſtate; whereas, by this deed, he put it out of his power to do ſo, and alſo gave the ſon poſſeſſion in his own time, reſerving only a ſmall annuity. Theſe conſiderations made it reaſonable for him to be allowed the power of giving this *L.* 100 to whom he pleaſed.—Neither is it competent for the defender to object to it, when both he and his brother accepted of the diſpoſition, under that condition, and poſſeſſed upon it. Nor can the meaning of the clauſe be doubted to imply a power of burdening *gratuitouſly*, ſeeing it ſtands quite diſtinct in the deed, both from the clauſe ſubjecting the ſon in the father's debts, and from the clauſe of proviſion to children; and bears to be *by and attour the aforeſaid liſt of debts*; and alſo, *in favour of ſuch perſon or perſons as he ſhould thing fit.*

2*do*, The objection on the head of deathbed admits, that if the diſpoſition had been to a ſtranger, or even to an heir, but ſuch to whom the diſponer was under no antecedent obligation to give his eſtate, and the heir had accepted the diſpoſition, the faculty might have been exerciſed at any time; becauſe a diſponee has not the privilege of an heir; and an heir, accepting of a diſpoſition, is in no other caſe than a common diſponee. Now, the prior obligation, in this caſe, on the father, can make no diſtinction, becauſe he was only thereby bound not to diſappoint *gratuitouſly* the ſucceſſion of his ſon, but might have ſpent the whole eſtate. If therefore he paſſes from that power, and even denudes of the poſſeſſion long before his death, but under certain qualities and conditions; and the ſon accepts of his diſpoſition, and poſſeſſes upon it; ſurely the latter muſt be thereby held to give up his right *qua* heir, and to betake himſelf to his diſpoſition, with all its burdens and qualities. It matters not that the clauſe does not bear the words *etiam in articulo mortis*, ſeeing the clauſe runs in general terms, without limiting the time for exerciſing the faculty, and a diſponee cannot challenge on the head of deathbed.

" The Lords found, That in virtue of the faculty reſerved to *William*
" *Buchanan*, in the diſpoſition granted by him to his ſon, he could
" *gratuitouſly*, and on *deathbed*, burden the ſaid lands with the
" ſum of *L.* 100 *Sterling*; and that he properly exerced the ſame
" in favour of the purſuer by the bond and aſſignation granted
" to her." D. R.

Act. *Burnet.* Alt. *Montgomery.* Reporter, *Woodhall.*

N° CXXXV. 17th *November* 1758.

WINIFRED JOHNSTON, RELICT of JOHN WILSON, officer of excise at *Dumfries*,

AGAINST

MARY WILSON, SISTER and EXECUTRIX of the said JOHN WILSON.

Ready money lying in the defunct's custody at his death, not comprehended under a disposition of his goods, gear, and household-plenishing.

John Wilson, in 1751, executed a settlement of his affairs, whereby he disponed to *Mary Wilson*, his sister, a tenement of houses, and assigned her " in and to all and sundry goods, gear, debts, and sums " of money, gold and silver, coined or uncoined, which then pertain- " ed and belonged to him, or which should pertain and belong to him, " or be owing by whatsoever person or persons at the time of his " death"

In 1752 *John Wilson* married *Winifred Johnston*, and by the contract between them, became bound to pay her a yearly annuity of *L.* 32 *Sterling*; and likewise disponed to her the half of his househould-plenishing, in case there should be no children procreate between them, and the third part thereof in case there should be a child or children.

Of this marriage a son was born, but died soon after; and in *October* 1753, *John Wilson* executed a deed, proceeding on the recital of his settlement 1751, and of his marriage-contract 1752, and narrating, " That it had pleased God to call away, by death, the only son procre- " ate of the marriage; so that the right and interest falling to his wife " in his household-furniture, in all probability would be confined to " one third part thereof; therefore, and for the love, favour, and af- " fection he bore to her his well-beloved spouse; he thereby assigned " and disponed to her *his whole moveable goods and gear, and household-* " *plenishing, of whatever nature or species the same be of, which should* " *pertain and belong to him at his death.*"

At *Wilson*'s death, which happened soon after executing this last deed, there was found in his cabinet *L.*25 : 19*s. Sterling* in cash; which was intromitted with by *Mary Wilson*, the sister, and general disponee and executrix of the defunct.

Winifred Johnston the relict brought a process against *Mary Wilson* for payment of the said sum, as conveyed to her by the foresaid disposition 1753 of the defunct's *whole moveable goods and gear, and household-plenishing*.

Pleaded for the defender, It is a certain rule, That in all settlements of succession, words must receive such a construction as shall appear from the scope of the deed to have been put upon them by the testator, his will being in such cases the governing rule. Here it appears from the narrative of the deed 1753, that the reason of executing it was, to obviate a doubt which might arise as to the wife's share of the house-hold-

hold-furniture, in the event which had happened, of a child's being born, but predeceaſing the father; and therefore he could only mean to aſſign to her the whole houſehold-furniture, or other *corpora* belonging to him. As *goods and gear* does not comprehend lent money, or *nomina debitorum*, neither could ſuch words be meant to extend to ready caſh, which poſſibly might have been lent out, but accidentally returned, and in the teſtator's cuſtody at his death, and of the extent whereof he could have no determined notion at the time of executing this deed. In *l.* 92. § 1. *ff. De leg.* 3. the *pecunia numerata* and *inſtrumenta debitorum* are put upon the ſame footing. Moreover the deed 1753 and the deed 1751 are here to be taken as one entire ſettlement; and in the deed 1751, the defunct expreſsly aſſigned to the defender, not only "his "whole goods and gear, but debts, ſums of money, gold and ſilver, "coined or uncoined, which ſhould pertain to him;" and when he had thus explicitly conveyed to the defender his whole money, it will not be preſumed, that he meant to recal or alter that ſettlement by a ſubſequent deed, which can admit of a conſtruction agreeable to the ſaid ſettlement.

Anſwered for the purſuer, It is eſtabliſhed in law, That the diſpoſitive words of a latter-will or teſtament ought not to be limited by the inductive cauſe recited in the deed, becauſe no teſtator is obliged to expreſs the motives of his will; and although he may have expreſſed only one motive, yet he might have had others which he did not think fit to expreſs. It is likewiſe clear, that here the teſtator went beyond the ſolution of the doubt which is ſaid to have been the motive for his executing the deed, as he not only diſponed to his wife the whole houſehold-furniture, but alſo his *whole moveable goods and gear*; which words are allowed to comprehend body-cloaths, arms, books, and other *corpora*, though no part of houſehold-furniture: and further, in the narrative of the deed itſelf, he ſets forth an additional motive, *viz. love, favour, and affection*, which was ſurely broad enough to ſupport a diſpoſition of his whole moveable eſtate to his wife. It is admitted, that debts, or *nomina debitorum*, do not fall under the words *moveable goods and gear*, even with the addition of *whatever nature or ſpecies the ſame be of*; but caſh lying by the teſtator does ſo, as nothing can more properly be called *a man's gear*, than the ready money in his cabinet. It matters not that he could not exactly foreſee its extent, as that muſt be the caſe where-ever a man legates or conveys an *univerſitas* of any kind, and the legacy of his whole moveable goods or *corpora* could not be more certainly eſtimated before his death, than that of his ready caſh. And as to the mention in the deed 1751, of *gold and ſilver, coined and uncoined*, it is plainly an unneceſſary tautology, and his omitting to repeat them in the deed 1753, is no good reaſon for refuſing to give the words that he did uſe *their* full and legal interpretation.

"The Lords found, That the purſuer had no right to the money "lying by her deceaſed huſband at the time of his death." D. R.

Act. *Miller.* Alt. *Macqueen.*

N° CXXXVI.

N° CXXXVI. 21ſt *November* 1758.

WILLIAM FORD merchant in *Berwick*, ſupplicant.

A ſtranger intitled to apply to this court by a petition to the Lord Ordinary on the bills, for a warrant to arreſt juriſdictionis fundandæ cauſa.

Ford, a merchant reſiding in *Berwick*, intended to apply to the ſheriff of the *Merſe*, for a border-warrant to arreſt the goods of *Tabor* and *Thomſon*, two merchants in *London*, his debtors; but was adviſed that the ſheriff might have a difficulty in granting this warrant, as in other caſes, becauſe *Ford* was himſelf an *Engliſhmun*, and reſident in *England*. A petition was therefore given in to the Lord Ordinary on the bills; who reported the caſe to the Lords.

The court was unanimouſly of opinion, That the Lord Ordinary ſhould grant the warrant for arreſtment *juriſdictionis fundandæ cauſa*; and approved of this method of applying to the court, ſeeing a petition to the whole Lords was unneceſſary, as there was no need of intimation to the defenders. W. J.

Reporter, Lord Juſtice-Clerk.

N° CXXXVII. 29th *November* 1758.

ISAAC GRANT,

AGAINST

PETER GRANT.

Heritage of fourth brother goes to immediate elder.

William Grant of *Larg* had four ſons, *John*, *James*, *Peter*, and *George*.

George, the youngeſt, died without iſſue, leaving an heritable ſubject.

William, the ſon of *Peter* the third ſon, then deceaſed, obtained brieves for ſerving himſelf heir of line and conqueſt to *George*.

Iſaac, the ſon of *John* the eldeſt ſon, then deceaſed, oppoſed this ſervice, ſo far as it was intended to ſerve *William* heir of line to *George*; and for that purpoſe offered a bill of advocation, maintaining, That he, as the ſon of the eldeſt brother, was heir of line to the youngeſt brother, in preference to the immediate elder brother of the youngeſt.

" The Lords refuſed the bill." J. D.

For Iſaac, *Garden*.

N° CXXXVIII.

N° CXXXVIII. 1ſt *December* 1758.

YOUNGER CHILDREN of CAMERON of LOCHIEL,

AGAINST

His MAJESTY's ADVOCATE.

In claims upon forfeited eſtates for bonds of proviſion, delivery prior to the 24th June 1745 *muſt be proved.*

SEveral years prior to the 24th of *June* 1745, *Cameron* of *Lochiel* granted moderate bonds of proviſion to his younger children. The bonds contained a power of revocation, and diſpenſed with the not delivery.

Lochiel having been attainted for the rebellion of 1745, and his eſtate forfeited, his children claimed upon theſe bonds of proviſion.

Objected for his Majeſty's Advocate, 1*mo*, They contain a power of revocation. 2*do*, There is no proof offered of the bonds having been delivered evidents prior to the 24th of *June* 1745.

" The Lords diſmiſſed the claims." J. D.

Act. *Montgomery*. Alt. Crown-Lawyers.

N° CXXXIX. 2d *December* 1758.

ROBERT HOWES, and ALEXANDER CUNINGHAM his TRUSTEE,

AGAINST

JAMES GOODLET-CAMPBELL of *Auchline* and *Abbotſhaugh*.

Bona fide *payment*.

John Melroſe had three children, *William*, *Agnes*, and *Catharine*.—— *Catharine* was married, and had iſſue.

Agnes Melroſe married *James Goodlet* of *Abbotſhaugh*, and had iſſue, *James*, *John*, *Alexander*, and *Agnes*.—— *James* and *John* died without iſſue.—— *Alexander* went to *America* about the year 1702, where he was ſuppoſed to have died childleſs, but had iſſue a daughter, married to *Job Howes*, the father of *Robert Howes*.

Agnes Goodlet married *Robert Campbell* of *Auchline*, and had iſſue *Duncan Campbell*, the father of *James Goodlet-Campbell*.

In *April* 1719, *William Melroſe*, then reſiding in *London*, obtained from *James Goodlet*, the huſband of *Agnes Melroſe*, an heritable bond for *L.* 710 *Sterling*, for money advanced, upon which he was infeft.

In *April* 1739, he made a will after the *Engliſh* form, and died ſoon

after. By that will, beſides other legacies, he bequeathed *L.* 50 to his niece *Agnes*, the wife of *Robert Campbell*, and *L.* 500 to her younger children; alſo *L.* 500 to the deſcendents of his ſiſter *Catharine*.—— He made no mention of the heritable bond in his will; and it is uncertain whether he knew, that, by the law of *Scotland*, it could not be conveyed by a teſtament: but without including this heritable debt, his other effects were not equal to the legacies. And the teſtament bore a ſpecial condition, that the legatees ſhould be bound to execute any act or deed neceſſary for eſtabliſhing the will, when required by the executors, under the pain of forfeiting their legacies.

By the death of *William Melroſe*, the ſucceſſion to the heritable bond devolved upon the deſcendents of his two ſiſters, who were both dead; and the one half of it therefore belonged to *Robert Howes*, as deſcended of his nephew *Alexander Goodlet*, the ſon of his eldeſt ſiſter, and the other half belonged to the deſcendents of *Catharine*. At this time *James Goodlet*, the huſband of *Agnes Melroſe*, had conveyed his eſtate to *James Goodlet-Campbell*, his great-grandſon, who was therefore debtor in the heritable bond.

As no certain information was received from *America*, concerning the iſſue of *Alexander*, a precept of *Clare conſtat* was granted by *Duncan Campbell*, acting as adminiſtrator for *James Goodlet-Campbell* hiſon, the debtor in the bond to *Agnes Goodlet*, and alſo to the eldeſt ſon of *Catharine Melroſe*, who then, in conſequence of the condition above mentioned conveyed the heritable bond to the executors of *William Melroſe*'s will, in order to make up a proper fund for the legacies. The executors brought an action for payment againſt *James Goodlet-Campbell:* to which it was *objected*, That with reſpect to one half of the bond, *Agnes Goodlet* was not the true heir; for that there was a report that *Alexander Goodlet* had left iſſue in *America*.

To remove this objection, *Agnes Goodlet* obtained herſelf ſerved and retoured heir-portioner in general to *William Melroſe*; and upon production of this ſervice, the Lord Ordinary decerned for payment, and a decreet was extracted; in conſequence of which the money was paid, and diſtributed by the executors of *William Melroſe*'s will amongſt the legatees.

At the diſtance of ten years, *Robert Howes* granted a truſt-bond to *Alexander Cunnynghame*; upon which Mr *Cunnynghame* led an adjudication againſt *Robert Howes*, as charged to enter heir in ſpecial to *William Melroſe* his great-granduncle; upon the title of which he brought an action againſt *James Goodlet*, as debtor in the heritable bond, to one half of which *Robert Howes* had right.

Pleaded in defence, That payment had been made of the whole bond above ten years before, upon a legal and ſufficient warrant; and although it now appears, that as to one half, it was not made to the true heir, yet as it was made *bona fide*, the defender muſt be ſecure.

2*dly*, Suppoſing the payment had been made colluſively; yet as the defender was then an infant, and the affair was tranſacted by his adminiſtrator-in-law, the payment muſt ſtill be held, with reſpect to the defender, as *bona fide* made, ſeeing he is not liable for the fraud or delict of his tutor, from which he reaped no advantage.

Anſwered, The conduct of *Agnes Goodlet* was in this caſe extremely colluſive; and it appears, that *James Goodlet* her father, acting as adminiſtrator

miniſtrator to the defender, muſt have been acceſſory to the fraud intended againſt *Alexander Goodlet* and his iſſue in *America*; for *James Goodlet* was firſt prevailed upon to convey his eſtate of *Abbotſhaugh* to the grandſon of his daughter *Agnes*, although, according to the natural right of ſucceſſion, it ought to have deſcended to the iſſue of *Alexander*; and in like manner *Agnes Goodlet* concurred in the ſcheme which was concerted of diſappointing *Alexander*'s iſſue of the one half of the heritable bond, and with that view *Duncan Campbell* her ſon granted the precept of *Clare* to her; and although afterwards, to ſave appearances, he objected, when purſued for payment, That *Agnes* was not the neareſt heir, yet this defence was not properly inſiſted upon, and *Agnes* having thereafter obtained herſelf ſerved heir-portioner in general to *William Melroſe*, he readily acquieſced in the Lord Ordinary's interlocutor, decerning for payment, although he himſelf had acknowledged, before the Lord Ordinary, that there was a report concerning the iſſue of *Alexander* exiſting in *America*; and in this ſituation it was his duty to have inſiſted for a proof of that fact before making payment; and therefore he cannot be ſaid to have acted *bona fide*, ſo as to afford a defence againſt paying the ſame ſum over again to the perſon who is proved to have the only right; for it is the duty of every debtor, when purſued by a perſon making up titles as heir, to object againſt payment, upon account of the exiſtence of a nearer heir, and to inſiſt upon that defence.

2*dly*, The queſtion in this caſe is not, Whether the defender ſhall be found liable for the fraud or delict of his adminiſtrator? but, Whether he can plead a defence upon *bona fide* payment, and found that defence upon what was done in his name by his adminiſtrator? and as it appears that his adminiſtrator not only acted collufively, but even ſuppoſing no colluſion, did not proceed in ſuch a manner in making the payment as to ſupport the defence of *bona fide* payment, the defender cannot now be allowed to plead that defence, more than if the whole tranſaction had been managed by himſelf.

Replied, 1*ſt*, A debtor is not obliged to make objections founded upon the right of a third party, againſt payment, but is intitled to pay to thoſe who appear to have a legal right. Upon theſe principles, a debtor who had made payment to the executors of a baſtard, being afterwards purſued by a donatar of baſtardy, " the payment to the ex-
" ecutors was found relevant to liberate the defender at the donatar's
" hands, ſeeing the defender had no neceſſity to inquire, or to know
" the condition of the creditor, and that although the executor had ta-
" ken no decree againſt him;" 18th *March* 1626, *Paterſon*.

2*dly*, The purſuer's argument muſt have the conſequence of making the defender anſwerable for the ſuppoſed fraud of his tutor. This, however, is inconſiſtent with the eſtabliſhed law, where the pupil is not benefited by the fraud, *l.* 15. *ff. De dolo*; and there can be no diſtinction, whether the tutor's fraud conſiſted in making payment *mala fide*, or in any other inſtance.

" The Lords found the defender liable for the principal ſum, intereſt,
" and penalty, and alſo in the expence of extracting the de-
" creet." W. J.

Act. *Lockhart*. Alt. *Rae, Burnett, Ferguſon*. Reporter, *Auchinleck*.

N° CXL.

N° CXL. 2d *December* 1758.

JOHN TELFER,

AGAINST

HUGH MAXWELL of DALSWINTON.

Father liable for furniſhings to his ſon above majority, while the ſon was apprentice.

James Maxwell, ſon to *Hugh*, from the age of nineteen to that of twenty-two, during the two firſt years of which he was an apprentice to a linen-manufacturer, contracted ſome trifling debts to tradeſmen, and, among others, one of *L.* 7 to *Telfer* a tailor. There were no complaints that his father had pinched him in his allowance.

In a proceſs at the tailor's inſtance againſt the father, the ſon being dead,

" The Lords found the father liable for the debt." J. D.

Act. *Agnew.* Alt. *Hugh Dalrymple.*

N° CXLI. 6th *December* 1758.

His MAJESTY's ADVOCATE,

AGAINST

Captain JAMES FRASER of BELLADRUM.

Tack for 1140 *years, if valid?*

UPon the 8th *June* 1670, *Hugh* Lord *Lovat*, in conſideration of a ſum of money advanced, granted a tack to *Simon Fraſer*, his heirs, aſſignees, or ſubtenants, of the lands of *Fingaſk*, for nineteen years, from *Whitſunday* 1670; " and after the iſh and expiration of the ſaid " nineteen years, for all the days, years, and terms of other nineteen " years; and at the iſh and expiry of the ſaid ſecond nineteen years, " for all the days, ſpace, and years and time of other nineteen years; " and ſo forth, from nineteen years to nineteen years, during all the " years of twenty times nineteen years; and after the expiry of the ſaid " ſpace of the ſaid firſt twenty times nineteen years, for all the years " of other twenty times nineteen years, and ay and while the ſaid ſe- " cond twenty times nineteen years be fully completed and outrun; " and after the expiry of the ſecond twenty times nineteen years, for " all the ſpace of other twenty times nineteen years; and ay and " while the ſaid three times twenty times nineteen years be completed " and outrun:" with warrandice at all hands, and againſt all mortals.

The

The tack-duty payable by the tenant was 56 bolls farm-bear, 4 bolls horſe-corn, 2 cuſtom-cows, 4 wedders, 4 lambs, 4 dozen poultry, and 15 merks of tithe. A precept of ſeiſin was ſubjoined to this tack, upon which the tenant was infeft 16th *June* 1670, and his ſeiſin duly recorded upon the 30th of the ſame month.

Upon the 14th *November* 1673, *Hugh* Lord *Lovat* being then dead, and his eſtate veſted in the Earl of *Seafort*, Sir *George Mackenzie*, and *Hugh Fraſer*, by virtue of certain appriſings; theſe appriſers confirmed this leaſe by a writing upon the back of it.

Upon the 14th *January* 1701, *William Fraſer*, eldeſt ſon of *Simon Fraſer* the tackſman, in conſideration of *L.* 400 *Scots*, aſſigned the leaſe to *Hugh Fraſer* of *Belladrum*.

Upon the 19th *March* 1747, Lord *Lovat* was attainted; and *James Fraſer* of *Belladrum*, the tackſman, entered a claim upon the tack, although that ſtatute did not require claims to be entered upon tacks.

It was *objected* to this leaſe by his Majeſty's advocate, 1*mo*, That being for ſo long a term as 1140 years, it was an anomalous right, and could not be effectual by the law of *Scotland*. 2*do*, Suppoſing it good againſt the granter and his heirs, yet it could not be good againſt a purchaſer; otherwiſe the faith of the records would be unhinged, and purchaſers rendered inſecure. 3*dly*, That the late Lord *Lovat* was not heir to *Hugh* Lord *Lovat*, the granter of the leaſe, but poſſeſſed the eſtate as a ſingular ſucceſſor, or purchaſer from *Hugh Fraſer*, the great-grandſon of the granter: and that *Hugh Fraſer* himſelf did not repreſent the granter; for that Lord *Hugh*, the granter's ſon, did not repreſent his father, but poſſeſſed upon appriſings and adjudications; and *Hugh Fraſer*, his grandſon, who conveyed the eſtate to Lord *Lovat*, did alſo poſſeſs upon ſingular titles.

Anſwered, 1*mo*, There is no law or uſage limiting leaſes to any certain number of years. Every leaſe, of whatever endurance, is, at common law, good againſt the granter and his heirs. Thus a leaſe was ſuſtained againſt the heir of the granter, which was let "as long "as the graſs groweth up, and the water runneth down;" 23d *January* 1717, *Carruthers contra Irving*.

It is beſides an eſtabliſhed point, That tacks are capable of being confirmed by the poſitive and negative preſcription, ſo as to cut off all challenge on account of want of power in the granter, as has been decided in ſeveral caſes with reſpect to long tacks of teinds; and preſcription muſt alſo confirm this tack againſt any challenge on account of the length of its endurance.

2*dly*, It was the ancient practice, prior to the ſtatute 1449, to inſert a precept of ſeiſin in tacks, and to take infeftment, which had the effect to render them valid againſt purchaſers; and this method was followed in the preſent caſe: but, independent of that infeftment, this tack muſt be effectual in conſequence of the ſtatute 1449, by which all tackſmen in poſſeſſion are declared to be ſecure againſt purchaſers: ſo that unleſs the length of the endurance ſhall be conſidered as a nullity of the leaſe, it muſt be effectual both againſt the heirs of the granter and againſt purchaſers. And upon the faith of the law ſo ſtanding, many leaſes have been purchaſed in different parts of the kingdom for a thouſand, and others for ſeveral hundred years. A liſt of many ſuch leaſes was exhibited; and it was averred, that in ſeveral inſtances great

ſums had been been laid out in buildings, and other improvements, upon the ſubjects leaſed.

Neither is it true, that the faith of the records will be expoſed to any danger by ſupporting ſuch leaſes; becauſe the ſtatute 1449 is only in favour of tenants who are in the natural poſſeſſion, and no purchaſe of land is ever made without inquiry made at the tenants with reſpect to the endurance of their leaſes, who have no intereſt to repreſent them as ſhorter than they truly are.—Suppoſing, therefore, that Lord *Lovat* had been truly a purchaſer, yet this leaſe muſt have been binding upon him; and, of conſequence, muſt be good againſt the crown in his right.

3*dly*, Though Lord *Lovat*, the forfeiting perſon, purchaſed the eſtate from *Hugh Fraſer*; yet he was bound by an expreſs article of the bargain, to indemnify *Hugh Fraſer* againſt the warrandice he ſhould incur in conſequence of any challenge brought againſt the deeds of *Hugh Fraſer*'s predeceſſors.—— Lord *Hugh*, the ſon of the granter, did indeed poſſeſs the eſtate upon an appriſing for a very ſmall ſum; but that appriſing did not comprehend every part of the eſtate; and therefore his poſſeſſion of the other parts not contained in the appriſing did ſubject him to a paſſive title. *Hugh Fraſer*, the grandſon of Lord *Hugh*, did alſo incur a paſſive repreſentation of the granter of the leaſe; for he granted a truſt-bond to the late Lord *Lovat* for *L.* 30,000 *Sterling*, for the purpoſe of completing a title to the eſtate in Lord *Lovat*'s perſon; and upon that truſt-bond, Lord *Lovat* did, by adjudication, make up a title to the whole eſtate of *Lovat*, and in particular to the ſuperiority of the eſtate, which remained in the *hereditas jacens* of the granter of the tack; in conſideration of which truſt-bond, Lord *Lovat* paid to *Hugh Fraſer L.* 12,000 *Sterling*. *Hugh Fraſer*, by this ſale of the ſuperiority, did therefore ſubject himſelf to a paſſive repreſentation of the granter; and was bound to fulfil his predeceſſor's deeds, at leaſt to the extent of what he gained by the ſucceſſion: and as Lord *Lovat*, the forfeiting perſon, became bound by the tranſaction with *Hugh Fraſer*, to indemnify him for the warrandice he ſhould incur in conſequence of any challenge brought againſt the deeds of his predeceſſors; no challenge could therefore be brought againſt this tack by the late Lord *Lovat:* and the crown, in his right, is alſo barred from all ſuch challenge; eſpecially as Lord *Lovat* had confirmed the leaſe, by accepting of the rent under it for a courſe of years.

Upon the 14th *January* 1758, the court found, That the tack in queſtion was good againſt the heirs of the granter; but found, that it was not good againſt *Simon* late Lord *Lovat*, the forfeiting perſon; nor is now againſt the crown, as coming in his place.

Upon the 22d *December* 1758, upon adviſing a reclaiming petition and anſwers, the court again found, That the tack in queſtion was not good againſt the crown.

Upon the 3d *February* 1759, upon conſidering a ſecond petition and anſwers, the petition was found not competent, ſo far as it reclaimed againſt two interlocutors in preſence, finding the tack not good againſt the crown: but the court reſolved to conſider, if the tack may be reſtricted to a ſhorter time, and to what time it may be reſtricted; and ordered memorials upon that point. And theſe memorials having been given in,

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" The Lords, in reſpect of the conſent of his Majeſty's Advocate, " found, That the tack in queſtion may ſubſiſt for nineteen years " from and after *Whitſunday* 1765, and no longer." W. J.

Act. *Macqueen, King's Counſel.* Alt. *Johnſtone, J. Dalrymple, Lockhart,* and *Ferguſon.*

N. B. This judgment was, in *March* 1762, reverſed upon an appeal, and the claim ſuſtained.

N° CXLII. 6th *December* 1758.

WILLIAM REID,

AGAINST

WILLIAM PROUDFOOT.

Obligation of relief of a written obligation cannot be created by parole-evidence.

Reid being charged for payment of a bill of *L.* 7 : 6 : 3, accepted by him in favour of *Lundy*, and indorſed away by *Lundy*, brought a proceſs before the juſtices of peace, againſt *Proudfoot*, founded upon the following facts.

That *Proudfoot* having bought linens from *Lundy*, *Lundy* refuſed to deliver them, unleſs *Proudfoot* ſhould get ſome perſon to be ſecurity with him for the price: That thereafter *Proudfoot* prevailed upon *Reid*, who was then a young country-lad, not of age, and a ſervant to a farmer, to accept a bill for the price, on a promiſe that *Reid* ſhould never be troubled for the money; and *Proudfoot* having told *Lundy*, that *Reid* was factor to a country-gentleman, prevailed upon *Lundy* to take the bill, and got the linens from him. On theſe facts *Reid* concluded againſt *Proudfoot* to be relieved by him of the above bill.

The juſtices having allowed a proof to *Reid*, he proved the above facts by the oaths of *Lundy* and his wife, and two other witneſſes. The juſtices gave decree in favour of *Reid*.

Proudfoot ſuſpended. In his ſuſpenſion he *alledged*, That he had got the linens, and that *Reid* had accepted the bill for the price of them; but maintained, that *Reid* had accepted the bill, not as ſecurity for him, but as debtor himſelf, to account betwixt *Reid* and him.

Pleaded for *Proudfoot*, the ſuſpender from the ſentence of the juſtices, No proof ought to have been allowed by the juſtice to *Reid*, of the facts alledged by him; and ſince it had been brought, it ought to be diſregarded, becauſe the intention of it was to create, by parole-evidence, an obligation of relief of a written obligation; whereas ſuch obligation of relief could only be created by oath or writ of party. This rule is general in the law of *Scotland*; and no ſuſpicion or preſumptions ſhould make courts remove general land-marks.

Anſwered for *Reid* the charger, By the purſuer's own account, it appears, *Reid* was impoſed upon, as he accepted the bill, and yet did not get the linens. This gives a right to courts to expiſcate by a proof the other circumſtances of fraud. The ſtrong preſumption of fraud

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in this caſe at firſt ſight, and the certainty of it afterwards, as proved by the evidence, make a particular exception in a particular caſe for the detection of fraud, an equitable exception from the general rule of ſtrict law.

" The Lords ſuſpended the letters." J. D.

Charger, *J. Craigie.* Suſpender, *Macqueen.*

N° CXLIII. 7th *December* 1758.

ASSIGNEE of ANGUS AND COMPANY,

AGAINST

His MAJESTY's ADVOCATE.

No annualrent due on claim on forfeited eſtate.

THE aſſignee of *Angus and Company*, ſhopkeepers in *Edinburgh*, claimed upon the forfeited eſtate of *Cameron* of *Lochiel*, who had been attainted for the rebellion 1745, payment of an account of furniſhings made to *Lochiel*, down to the 24th of *June* 1745.

The aſſignee claimed, further, annualrent from a year after the laſt article of the account.

To this laſt demand his Majeſty's Advocate objected.

Pleaded for the claimant, The Lords are in uſe to give annualrent to tradeſmen after the lapſe of a year from the laſt article of their account, on this principle, That the furniſher has a right of indemnification for the loſs he ſuſtains by lying out of his money. *Lochiel* would have been liable, had he not been attainted, for annualrent: if ſo, the crown muſt be equally liable; becauſe the veſting-act declares, " That no per- " ſon or perſons whatſoever, having any eſtate, right, title, or intereſt, " in law or equity, in, to, or out of any of the forfeited eſtates, ſhall " be in any reſpect prejudiced by their being veſted in his Majeſty," with the exception of debts contracted after the 24th of *June* 1745; and directs all ſuch perſons to give in their claims within a certain time.

Anſwered for his Majeſty's Advocate, The Lords ſometimes give annualrent from a year after the laſt article of an account; but this they do not on the principle of indemnifying the creditor for the loſs he might otherwiſe ſuſtain: on the contrary, they give it only in the ſpecial caſe, that the debtor has been *in mora* in his payment; and the debtor will be free if the creditor has been *in mora* to receive. If it is given at all, it is given, not to indemnify the one, but *nomine damni*, and in order to puniſh the other for his failure of payment in proper time. But, in the preſent caſe, there has been no *mora* on the ſide of the crown. The veſting-act provided for the payment of the debts of the traitor; it impowered the court of ſeſſion to aſcertain thoſe debts; but till thoſe debts are aſcertained, the creditor cannot act, nor can the crown be *in mora* for not making payment of the debts of the traitor.

" The Lords found no annualrent due." J. D.

Act. *Ilay Campbell.* Alt. The Crown-Lawyers.

N° CXLIV.

N° CXLIV. 12th *December* 1758.

COUNTESS-DOWAGER of GLASGOW,

AGAINST

JANET THERMES.

Carrier breaking agreement, liable for every hazard.

LAdy *Glaſgow* being to ſend ſome looking-glaſſes from *Edinburgh* to *Glaſgow*, gave expreſs orders to the carriers of them, who were employed under *Janet Thermes* a carrier, to carry them upon horſeback, and not in a cart; which orders were promiſed to be obeyed.

The carriers, however, put them upon a cart above meal. When they arrived at *Glaſgow*, they were found to be broke.

In a proceſs at my Lady's inſtance againſt *Janet Thermes*, for the value of the glaſſes, *Janet Thermes* proved, that the glaſſes were ſo inſufficiently packed in the frames, that they could hardly fail to have been broke though carried on horſeback.

" The Lords found *Janet Thermes* liable." J. D.

Act. *Miller.* Alt. *Jo. Dalrymple.*

Hearing in Preſence.

N° CXLV. 14th *December* 1758.

JOHN PHILP,

AGAINST

The EARL of ROTHES.

Tailzie prior to the act 1685, *if it muſt be recorded?*

IN *January* 1684, the Counteſs of *Rothes* made a ſettlement of the eſtate of *Rothes*, in favour of herſelf, and the heir-male of her then marriage; which contained a procuratory of reſignation, and was fenced with all the prohibitory, irritant, and reſolutive clauſes uſual in ſtrict entails.

The Counteſs did not expede a charter upon this entail until the year 1687, nor took infeftment until the year 1689; nor did ſhe ever record the entail at all.

The Counteſs was ſucceeded by her ſon Earl *John*; who contracted large debts; and, among others, a debt to *John Philp*. Earl *John* was ſucceeded by the preſent Earl; againſt whom *Philp* brought a proceſs for payment of this debt.

The Earl's *defence* was, That he took his eſtate under the entail 1684, and therefore was not liable for the debts of his predeceſſors.

Objected for *Philp*, 1*mo*, The ſettlement of 1684 could not protect againſt creditors, in reſpect it was never recorded in the regiſter of entails; and entails made prior to the act 1685, were by that act required to be recorded, as well as thoſe made poſterior to it.

Before the act 1685, it had been doubted, whether entails were good at common law. Even ſuppoſing them to have been good, it was obſerved, that there was no regiſter for recording them, and that creditors and purchaſers might be intrapped by the latency of them. To remove that doubt, and give validity in law to entails, and to remove this danger, and prevent creditors and purchaſers from being intrapped, the act 1685 was made. This act, which declares it "lawful for "his Majeſty's ſubjects to tailzie their lands and eſtates," does alſo, for the ſecurity of purchaſers, and of juſt and lawful creditors, expreſsly declare, That "ſuch tailzies ſhall only be allowed, in which the afore-"ſaid irritant and reſolutive clauſes are inſert in the procuratories of re-"ſignation, charters, precepts and inſtruments of ſeiſin, and the ori-"ginal tailzie once produced before the Lords of Seſſion judicially, "who are ordained to interpoſe their authority thereto, and recorded "in a regiſter appointed by this act to be kept for that ſpecial purpoſe." As this regiſter can be inſpected eaſily, and at ſmall expence, no purchaſer or creditor can be inſnared. The general regiſter of infeftments is only ſearched, in order to diſcover the incumbrances on an eſtate; and is no ſecurity againſt entails, which cannot be there diſcovered, but with difficulty, and at great expence. The act thus chiefly regarding the ſecurity of purchaſers and creditors, certainly intended, that all tailzies, as well thoſe prior as poſterior to the act, ſhould be recorded in this regiſter. And there is no reaſon to ſuppoſe, that its proviſions do not extend to tailzies executed prior to this act: it muſt have appeared great injuſtice, to leave creditors to be inſnared by theſe ancient latent deeds, when it could be remedied by the eaſy method of recording them in a particular regiſter.—The reaſon of the thing, the danger to creditors and purchaſers, and the neceſſity of a proviſion to prevent that danger, apply equally to entails made before as to entails made after the act; and therefore the act muſt be preſumed to have been intended to apply equally to both.

The reaſon and ſpirit of the ſtatute are confirmed by the words of it. The ſtatute enacts, as to all tailzies in general, without any diſtinction of paſt or future ones, which it certainly would have diſtinguiſhed, if it had meant a diſtinction; and as it injoins a form poſſible to be obſerved, with regard to tailzies already made, as well as thoſe to be made, the general directions of the act muſt be complied with. For the clauſe above mentioned, That ſuch tailzies ſhall only be allowed as are recorded, does plainly put a negative upon, and exclude from the benefit of the act, all thoſe which ſhall not be ſo recorded.

The 33d act 1690, intitled, *Act for ſecurity of creditors, vaſſals, and heirs of entail of perſons forfeiting*, enacts, "That heirs of entail, where "their infeftments are affected with irritant and reſolutive clauſes, "ſhall not forfeit the entailed eſtate by their treaſons, providing the "right of tailzie be regiſtered, conform to the act of parliament 1685." From whence it is evident, that forfeiture took place, without diſtinction, whether the tailzie was executed prior or poſterior to the act 1685, unleſs where the entail was duly recorded: and as no entail,

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though prior to the act 1685, unleſs recorded, could bar a forfeiture, the ſame rule ought to take place with equal reaſon in the caſe of juſt and onerous creditors.

Anſwered for the Earl of *Rothes*, No law can be preſumed to have a retroſpect without expreſs words; and as there is no mention in this act, of tailzies executed prior to the date of it, none of the proviſions of this act can be extended to theſe. The act ſo far reſpects old entails, that the proviſions and irritancies muſt be repeated in every ſubſequent conveyance of the eſtate to any of the heirs of entail, which creditors and purchaſers may ſee by looking into the other common records, without great trouble or expence. But the act does not make the validity of the entail, before the tranſmiſſion, depend upon the regiſtration of it in the regiſter of entails. If it had, the act would have put it in the power of all the proprietors of the old entails at the date of the act to have deſtroyed them, by refuſing or neglecting to put them into the regiſter of entails.

The words of the act, critically conſidered, confirm this. It ſtatutes and declares, " That it *ſhall* be lawful for his Majeſty's ſubjects, " to tailzie their lands and eſtates, and to ſubſtitute heirs in their tail- " zies, with ſuch proviſions and conditions as they *ſhall* think fit." Theſe words are ſo far from creating a retroſpect, that they clearly relate only to future entails, and to thoſe who *ſhall* thereafter make them.

This interpretation is confirmed by the analogy of law. The act of 1617, which requires ſeiſins to be regiſtered within ſixty days of their date, has not been underſtood to have a retroſpect, or to regulate ſeiſins taken before the act, which as the law ſtood previous to it, were completed without regiſtration.

Objected for *Philp*, 2*do*, The ſettlement of 1684 not having been confirmed by infeftment prior to the act 1685, and only confirmed by infeftment after it, was no entail prior to that ſtatute: it was only an inchoated, not a complete deed; it did not become an entail till after the ſtatute; and therefore required regiſtration, like other entails made after the year 1685.

Anſwered for the Earl of *Rothes*, The error of this objection ariſes from not attending to a diſtinction betwixt a real deed and a complete one. Till infeftment, the ſettlement of 1684 was not a real right; but by the Counteſs's ſignature it became a complete deed. Her ſon, the next heir, could have been compelled to make up his titles upon that entail if he had refuſed to do it; and when he did it, the infeftment is drawn back to the date of the ſignature, and validates the whole.

" The Lords found, That the tailzie in queſtion ought to have been " recorded, in terms of the act of parliament 1685 concerning " tailzies." J. D.

Act. *Hamilton-Gordon, A. Pringle, Ferguſon.* Alt. *Miller, Advocatus, Lockhart.*

N. B. This judgment was affirmed in the houſe of Peers.

N° CXLVI.

N° CXLVI. 14th *December* 1758.

NORMAND MACLEOD,

AGAINST

WILLIAM FRASER.

It is no defence againſt an action of relief, that the ſum engaged for by the purſuer was the price of the tranſaction of a criminal proceſs brought againſt the defender.

Normand Macleod of *Macleod* purſued *William Fraſer* for relief of a bill of *L.* 70 granted by him *Macleod* to the magiſtrates of *Inverneſs* in the year 1745.

The facts on which he qualified his claim of relief were, That at the time of granting the bill, *William Fraſer* was under trial in the court of juſticiary, in the name of the King's Advocate, but at the expence of the town of *Inverneſs*, for the forcible abduction, rape, and marriage, of his now wife: That *William Fraſer* had applied to him to make up the matter with the town of *Inverneſs*; and that he made it up with the town, by granting the bill in queſtion, being the neat expence which at that time had been laid out on the trial; and that in conſequence thereof the proſecution was diſmiſſed againſt *Fraſer*.

Anſwered for *William Fraſer*, Suppoſing the facts to be true, they were not relevant to give a title to relief: for tranſacting a crime is in itſelf a crime, a null act; and the rule of law takes place, *Quod in turpi cauſa melior eſt conditio poſſidentis.*

" The Lords found *William Fraſer* liable for the contents of the bill."

J. D.

Act. *Roſs, And. Pringle, Ferguſon.* Alt. *J. Dalrymple, Lockhart.*

N° CXLVII. 18th *December* 1758.

AGNES LOGAN, and YOUNGER CHILDREN of HUGH CAMPBELL,

AGAINST

His ELDEST SON.

Husband may on deathbed grant rational liferent to wife, to affect heir.—Quantum of aliment to children unprovided.

Hugh Campbell purchaſed the lands of *Pencloe*, in a country-pariſh, from his brother *Andrew*, for 19,600 merks. He paid the price, received a diſpoſition; but no infeftment followed. This purchaſe exhauſted all the fortune he had.

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Six months after, *Hugh* being upon deathbed, and ſeeing that he had no other fund for a proviſion to his wife and younger children, cancelled the diſpoſition; took an obligation from *Andrew* to ſell the lands for behoof of *Hugh* and his heirs; and then made a proviſion of 300 merks yearly for *Agnes Logan* his wife, and 11,000 merks among his three younger children; 8000 merks of which was payable at his own deceaſe, and 3000 at the deceaſe of his wife.

The heir having brought, and ſucceeded in, a reduction of this tranſaction, ſo far as regarded the proviſions made for the younger children, *vide* caſe, *p.* 88. of this volume, the younger children next brought a proceſs of aliment againſt him, and the widow likewiſe inſiſted for payment of the proviſion made for her.

" The Lords reſtricted the annuity provided to the widow to 200 " merks, and modified the aliment to be paid to the younger chil- " dren to 250 merks yearly, to be divided equally amongſt them, " ſo long as they all remain minors; and after the majority of " the eldeſt, to the other two, equally betwixt them, ſo long as " they continue both minors; and after the majority of the two " eldeſt, to the remaining one, ſo long as he or ſhe ſhall remain " minor; and failing of any one or more of them by deceaſe in " minority, to the ſurvivors equally, or to the ſurvivor: And " found, That ſo ſoon as the relict's annuity ſhould ceaſe by her " death, the aforeſaid aliment of the children ſhould be increaſed " 100 merks yearly, to be divided, ſubſiſt, and terminate, in the " ſame manner with the original aliment." J. D.

Act. *Jo. Dalrymple.* Alt. *Burnett.*

N° CXLVIII. 19th *December* 1758.

WILLIAM CAWFIELD, Eſq; SUPPLICANT.

Prorogation of a leaſe by authority of the court upon a ſequeſtrated eſtate.

THE eſtate of *Caſtlehill* was ſequeſtrated in the year 1748; and a proceſs of ranking and ſale having been brought, it appeared by the proof, that the lands were worth, at twenty-two years purchaſe, *L.* 70,635 *Scots*; and that certain houſes in the town of *Inverneſs*, at fourteen and fifteen years purchaſe, were worth *L.* 9340 *Scots*: That the eſtate was ſubject to two liferents, amounting to *L.* 125 *Sterling*; and that the debts, by a ſtate, amounted to *L.* 126,617 *Scots*: from which ſtate it appeared, that the debts exceeded the utmoſt price that could be expected for the eſtate.

William Cawfield had obtained the reverſion of a tack of the lands of *Meikle Draikies*, part of this eſtate, at the rent of *L.* 30; the years of which tack were nearly expired in the 1758. He beſtowed a conſiderable expence in improving the farm, by incloſing, draining, and culture, and was willing to lay out the further expence neceſſary to complete the improvement, provided he could obtain a renewal of his

leaſe. As the eſtate was bankrupt, and the heir of the family could not interpoſe, he applied to the court, ſetting forth theſe facts, and praying, that the factor upon the ſequeſtrated eſtate might be authoriſed to execute a prorogation of the tack for thirty years.

To this application ſeveral creditors gave their conſent, conſidering it as beneficial for the eſtate. The mother of the apparent heir alſo conſented.

The court remitted to the Lord Ordinary to inquire into the facts; who, after calling parties, appointed an intimation to be put up in the minute-book, that the whole creditors might be appriſed.

The caſe being afterwards reported to the court by the Lord Ordinary, and no objection made by the creditors,

" The Lords remitted to the Lord Ordinary to inquire how far this " demand will be beneficial to the eſtate, and to call the next " heir." W. J.

Act. *Hamilton-Gordon.* Reporter, Lord *Shewalton.*

N° CXLIX. 19th *December* 1758.

JAMES LUNDIN of DRUMS,

AGAINST

JAMES HAMILTON.

Warning only neceſſary in removings from land, not from a houſe, though in the country.

THE queſtion which occurred betwixt theſe parties was, Whether a regular warning was neceſſary to be executed forty days before *Whitſunday*, previous to any proceſs of removing, againſt a tackſman of a houſe in the country? or, Whether the act 1555, anent warnings, does not apply *only* to the poſſeſſors of lands?

See *Craig*, *lib.* 2. *d.* 9. § 18.; *Stair*, title, *Tacks*, § 38.; Sir *George Mackenzie*, Obſerv. on ſaid act; *Bankton*, *vol.* 2. *p.* 110.; *Deciſion*, 21ſt *November* 1671, *Riddle.*

" The Lords unanimouſly found, That the act 1555 did not extend " to houſes in the country." G. C.

Act. *D. Græme.* Alt. *Lockhart.* Reporter, Lord Juſtice-Clerk.

N° CL.

N° CL. 20th *December* 1758.

BETHIA YULE,

AGAINST

JOSEPH YULE.

Conditio, Si ſine liberis deceſſerit, *does not take place, where the father has known of his children without making any alteration.*

John Yule, when unmarried, and near eighty years of age, lent out two ſums of 1000 merks each, upon two bonds. Both bonds bore the money to be borrowed from him, and they were taken payable to him; and failing him by deceaſe, to his brother *Joſeph*. Theſe ſums were equal to about one fourth of his fortune.

Afterwards he married, and had children: he lived three years after the date of the bonds, and two years after the birth of his firſt child; but never made any alteration in the tenor of the bonds.

Joſeph had been in uſe to impreſs money into *John*'s hands, to lend out for him; and *John*, before his death, had been heard to ſay, that he had taken care of his brother. But whether ſuch ſums or ſuch converſations had any reference to the bonds in queſtion, did not clearly appear.

Upon *John*'s death, his daughter *Bethia claimed* theſe bonds, on this ground, That the ſubſtitution to *Joſeph* muſt be underſtood to have been under an implied condition, *Si ſine liberis deceſſerit*, and fell to the ground as ſoon as that condition failed by the exiſtence of children; and ſupported her plea on the authority of the Civil law, contained in the Reſponſe of *Papinian*, in *l.* 102. *De conditionibus et demonſtrationibus*; and *l.* 30. *Cod. De fideicommiſſ.* extending the limits of that Reſponſe; and *l.* 40. *par.* 3. *De pact.*

Anſwered for *Joſeph Yule*, The Reſponſe of *Papinian*, which introduced the implied condition, *Si ſine liberis deceſſerit*, does not apply to the caſe in hand.

For, 1*mo*, It ſuppoſes the caſe of an univerſal *fideicommiſſ.* to reſtore the whole ſucceſſion ſettled by the granter to a collateral relation, in caſe of the deceaſe of the heir, or other perſon *honoratus*. There the condition, *Si ſine liberis deceſſerit*, has been implied, becauſe it was thought the teſtator would not have tied him to give up the whole ſucceſſion, if he had foreſeen the event of his having iſſue of his own body. Whatever reaſon there may be for this preſumption in an univerſal ſucceſſion, it would be taking too much liberty with the expreſs wills of defuncts, to imply ſuch condition in every ſpecial legacy, and thereby to interpolate ſubſtitutes whom the teſtator has not called.

2*do*, It is agreed upon in the conſtruction of this law, that the implication only takes place when the event was unforeſeen by the teſtator. For inſtance, if there were children exiſting at the time, they will not be underſtood to be *in conditione poſiti*, if they were not named; for the law will not interpolate, in a ſettlement, heirs whom the teſtator

tor had in his eye, and did not think fit to give a place to in it; *Voet, tit. ff. Ad ſenatuſconſult. Trebellian.* § 18. And for the ſame reaſon, where the children are afterwards born during the teſtator's life, and he makes no alteration of the ſubſtitution in their favour, the preſumption is, that he meant the deſtination to ſubſiſt in the terms it was expreſſed; *Bankton, vol. 1. p. 227.*

"The Lords found, That *Joſeph* had a right to the bonds." J. D.

Act. *J. Dalrymple, Lockhart.* Alt. *Montgomery, Miller, Ferguſon.*

N° CLI. 20th *December* 1758.

Sir WILLIAM MAXWELL of SPRINGKELL,

AGAINST

BENJAMIN BELL.

Reduction on the act 1696.—*Competition as to the annualrents of an heritable debt, between a diſpoſition not intimated, and an arreſtment.*

William Scot and *Benjamin Bell* carried on for many years a trade of purchaſing cattle in *Scotland*, and ſelling them in *England*, which began in the year 1720.

In 1727, they acquired from *John Somervel, equally betwixt them*, an heritable debt on the eſtate of *Crowdiknow* for *L.* 350, upon which *Somervel* had been infeft. The heritable bond, and conveyance in their favour, was produced in the ranking of *Crowdiknow*'s creditors.

Upon the 8th of *April* 1745, a final clearance was made between them, by a fitted account, in which the whole of this debt was ſtated to the debit of *Bell*; and after ſtating every other article, the balance came out due to *Scot* by *Bell L.* 454. A diſpoſition was the ſame day executed by *Scot* in favour of *Bell*, of *Scot*'s ſhare of this debt, aſſigning him to *Somervel*'s precept.—*Bell* afterwards paid to *Scot* the balance due by the account.

In the year 1746, *Bell* put *Scot*'s diſpoſition into the general regiſter.

In 1748, *Scot* became a bankrupt in terms of the act 1696.

In *July* 1749, Sir *William Maxwell*, as creditor to *Scot*, arreſted in the hands of *Graham*, purchaſer of *Crowdiknow*, in order to affect *Scot*'s ſhare of the annualrents of this debt; and, in *February* 1750, obtained an adjudication againſt *Scot*, in order to attach the debt itſelf.

In *July* 1750, *Bell* took infeftment upon *Somervel*'s precept, which, as to *Scot*'s ſhare of the debt, proceeded upon the diſpoſition 1745.

Sir *William Maxwell* brought an action of forthcoming upon his arreſtment, in the courſe of which he alſo produced his adjudication.

Benjamin Bell appeared, and claimed to be preferred upon his diſpoſition from *Scot*, completed by infeftment in *July* 1750.

Pleaded for Sir *William Maxwell*, By the ſtatute 1696, all voluntary diſpoſitions by a bankrupt in favour of his creditor, within ſixty days before his bankruptcy, in preference to other creditors, are declared null. And it is further declared, "That all diſpoſitions, heritable "bonds, or other heritable rights, whereupon infeftment may follow, "granted

" granted by the foreſaid bankrupts, ſhall only be reckoned as to this " caſe of bankrupt to be of the date of the ſeiſin lawfully taken thereon." The diſpoſition by *Scot* to *Bell* muſt therefore be held as of the date of the infeftment taken in *July* 1750, which was two years after the bankruptcy.

2dly, Sir *William* is at any rate preferable upon his arreſtment to the annualrents of the debt preceding *July* 1749, when the arreſtment was uſed, becauſe the diſpoſition in favour of *Bell* was not completed by intimation or infeftment before that time.

Anſwered, *1ſt*, The act 1696 only applies to diſpoſitions or heritable bonds which contain an immediate warrant for infeftment; whereas the diſpoſition by *Scot* to *Bell* conveyed only *Somervel*'s precept, upon which the infeftment was afterwards taken. Beſides, the diſpoſition by *Scot* was not granted for ſecurity of a prior debt, but for money ſoon after advanced by *Bell*. At any rate, the act 1696 cannot apply to this caſe: for the heritable debt in queſtion was a copartnery-ſubject, and at clearing the copartnery-accounts, was conveyed to one of the partners, as a diſtribution of the company-effects; which could not be overturned by the ſubſequent bankruptcy of either.

2dly, If *Bell* has right to the heritable debt itſelf, he muſt alſo have right to the annualrents: the diſpoſition in his favour was ſufficient to diveſt *Scot* without intimation, and muſt carry the debt and all its advantages.

Replied, It is true, that it was found, in *January* 1734, creditors of *Scot* of *Blair contra Charteris*, that the act 1696 did not apply to the caſe of diſpoſitions not containing immediate warrant for infeftment: that judgment, however, proceeded upon a principle of law, the contrary of which was afterwards eſtabliſhed. It was at that time held to be a principle of law, that ſuch diſpoſitions did completely denude the granter. This had been found, 20th *November* 1733, *Sinclair*; but it was afterwards adjudged and eſtabliſhed, 22d *June* 1737, *Bell* of *Blackethouſe*, that a poſterior diſponee to ſuch kind of rights, completing his title by infeftment upon the precept aſſigned, was preferable to a prior diſponee, as being the firſt who completely denuded the granter: and it muſt follow, of conſequence, that in this caſe *Bell* had not denuded *Scot*, or completed his right, till *July* 1750, after *Scot*'s bankruptcy.—Suppoſing the conveyance by *Scot* to *Bell* to have been granted for a ſum advanced, or ſoon after paid, this would not be a good defence againſt the reduction on the act 1696; as will appear by the deciſions collected, *p.* 86. of the Dictionary, *voce*, *Bankrupt*; 29th *January* and 12th *December* 1717, *Grant contra Duncan*. And upon that point, after a contrary deciſion, 19th *January* 1726, *Chalmers*, there followed two other caſes in terms of the firſt deciſion; 19th *June* 1731, creditors of *Merchiſton*; 25th *November* 1735, truſtees of *Matthieſon*'s creditors. In each of theſe three caſes, the diſtinction between *nova debita* and prior debts was rejected. — Neither is the pretext of a copartnery a good defence: for in this caſe, there appears to have been no permanent company between *Scot* and *Bell*, but a joint trade carried on from year to year, and the profit annually divided.— At any rate, this heritable debt was no copartnery-ſubject, but diſponed to them by *Somervel*, not as partners, but equally betwixt them; and it was not conveyed by *Scot* to *Bell* as a diſtribution of the com-

pany-effects, but, in ſome meaſure, ſold to him for money he was afterwards to pay.

2dly, As to the annualrents, the diſpoſition in favour of *Bell* did not denude *Scot* till infeftment was taken; and therefore, till then, the diſpoſition only imported an aſſignation as to the annualrents, which was not completed by intimation till after the arreſtment; for the date of a diſpoſition not completed, can have no effect in a queſtion with third parties. In two ſimilar caſes, an arreſtment was preferred, as to the rents of lands, to a prior diſpoſition upon which infeftment was not taken till after the arreſtment; 22d *November* 1633, *Warnock contra Anderſon*; 24th *June* 1642, Lord *Forreſter contra Caſtlelaw*.

The court ſeemed chiefly moved by the defence founded on the co-partnery.

" The Lords found, That *Benjamin Bell* was preferable to Sir *William* " *Maxwell*, as to the principal ſum and annualrents in queſtion."

W. J.

For Sir *William Maxwell*, *Johnſtone*, *Ferguſon*. Alt. *Montgomery*. Clerk, *Kirkpatrick*.

N° CLII. 20th *December* 1758.

DAVID MULLO,

AGAINST

JAMES and ROBERT MULLOS.

Queſtion of relief between an heir and executor.

BY marriage-contract, in the year 1743, betwixt *Alexander Mullo* and *Chriſtian Robertſon*, *Alexander* had " bound and obliged him, his " heirs and executors, at and againſt the term of *Whitſunday* thereafter, " to provide and have in readineſs, of his own proper means and ef- " fects, the ſum of 10,000 merks; and to ware, employ, and beſtow " the ſame, upon land, or other good ſecurity, for annualrents; and " to take the rights and ſecurities to be granted therefor, conceived " in favour of himſelf, and the ſaid *Chriſtian Robertſon*, his promiſed " ſpouſe, and longeſt liver of them two, in liferent, and to the child " or children to be procreate between them of ſaid marriage, their " heirs, executors, or aſſignees, in fee; and failing of children, *L.* 1000 " of ſaid principal ſum, to fall, accreſce, and belong to the ſaid *Chri-* " *ſtian Robertſon*, her heirs, executors, or aſſignees, in caſe ſhe ſhall " happen to ſurvive the ſaid *Alexander Mullo*, her apparent huſband."

An after clauſe in the ſame marriage-contract is in the following words: " And in order that the ſaid *Chriſtian Robertſon* may be the " better ſecured in the regular payment of the annualrent of the " foreſaid principal ſum of 10,000 merks, in caſe ſhe ſhall happen " to ſurvive him, he thereby binds and obliges him and his fore- " ſaids thankfully to content, pay, and deliver, to the ſaid *Chriſtian* " *Robertſon*, during all the days of her lifetime, after his deceaſe, an " yearly annuity or jointure of 500 merks, or any other annualrent a- " greeable

" greeable and correſponding, by the laws of this kingdom for the time, " to the foreſaid principal ſum of 10,000 merks."

After this marriage *Alexander* purchaſed a tenement of houſes in *Dundee*, of *L.* 20 yearly value, the rights of which he took, not in terms of the contract of marriage, but, in general, to himſelf, his heirs and aſſignees.

Alexander died in the year 1755; *Chriſtian Robertſon* ſurvived him; there were no children of the marriage; his ſubjects were the above tenement, and *L.* 700 of perſonal eſtate.

When on deathbed, *Alexander* executed two ſettlements: by the one, he conveyed his moveable ſubjects to his nephews *James* and *Robert Mullos*, and burdened them with the payment of 200 merks of his wife's jointure provided to her by the above contract of marriage; by the other, he diſponed the tenement in *Dundee* to another nephew, *Alexander Mullo*; with this proviſo, " Providing and declaring, that the " ſaid *Alexander Mullo* ſhall, by acceptation hereof, be expreſsly bound, " burdened, and obliged, to content and pay yearly to *Chriſtian Ro-* " *bertſon* his ſpouſe, during all the days of her life, after his deceaſe, " the ſum of 300 merks *Scots*, as a part of the yearly jointure provi- " ded to her by the marriage-contract entered into between them."

David Mullo, heir of conqueſt to *Alexander*, brought a reduction of *Alexander*'s diſpoſition of the tenement to his nephew *Alexander* on the head of deathbed, and prevailed in it. But *James* and *Robert Mullos*, the legatars of *Alexander*, and who were likewiſe, with others, executors to him, appeared for their intereſt in the proceſs, and claimed relief of the ſum of 300 merks yearly, payable to the relict, as provided by the deathbed-diſpoſition, to which extent they inſiſted to ſupport the validity of the deathbed-diſpoſition.

Pleaded for *David Mullo*, *Alexander Mullo*, by taking the inveſtitures of the tenement to his heirs in general, did not implement the obligation in his contract of marriage, to take to his wife and ſelf in liferent, and children of the marriage in fee. This laſt proviſion therefore remained only *in nudis terminis* of a perſonal obligation, and as ſuch was ultimately preſtable by the executor, who was bound to relieve the heir thereof. Neither could that obligation be transferred from the executor upon the heir, upon the footing of the ſecond clauſe above mentioned of the contract of marriage: for the firſt clauſe is the primary, principal, and capital, obligation; the after clauſe is only an acceſſory obligation to the other. It is ſo immaterial, that nothing is therein expreſſed which would not have been implied, whether expreſſed or not; it being plain, that if the huſband was bound to lay out 10,000 merks for the wife's liferent, he and his repreſentatives would have been liable to her for the intereſt of the money whether laid out or not; and therefore any queſtion of relief betwixt the heir and executor, muſt be regulated by the governing clauſe; in which view that clauſe never having been implemented, the implement of it lies now upon the executor.

Anſwered, 1*mo*, There is no law that eſtabliſhes a privilege to a clauſe firſt inſerted in a writing, to aboliſh the ſubſequent clauſes of the ſame deed. All the clauſes, whether firſt or laſt in point of order, are to be conſidered equally as declarations of the will of the parties, and to have their full effect in the ſeveral events for which they are calculated. Nor

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is it to be preſumed, that any clauſe is added that is entirely inſignificant or uſeleſs. It is to be preſumed, that the parties had a view to a different event in the ſecond clauſe: if it will admit of that conſtruction, any conſtruction will be taken rather than to ſuppoſe they meant to ſay nothing, or *nihil agere*. Now, it is obvious that there are two ſeparate events, to which theſe clauſes fall reſpectively to be applied. The firſt is, Where the wife and the children ſhall happen both to be creditors to the father at his deceaſe. The ſecond is, Where there are no children exiſting, but the wife is the ſole creditor upon the contract. In the firſt event, the father is bound to lay out the ſum in favour of himſelf and his wife, and longeſt liver, in liferent, and the children of the marriage in fee. But for the other event, when there happens to be no children, and the wife is the only perſon who has an intereſt in the proviſion, the other clauſe is adapted for ſecuring her in the due payment of the annuity or annualrent yearly, during her life. Suppoſe the wife had been paſt childbearing at the time of the marriage, no writer could have inſerted the firſt clauſe in the contract; the ſecond would then have been thought the only proper obligation to lay upon the huſband, *viz.* to pay or ſecure to his wife a yearly annuity, to be paid to her in caſe of ſurvivance: and if that would have been the only clauſe, had the event that has now exiſted been foreſeen at the time, it ſeems pretty plain, in conſtructing the effect of the obligation, that that is the clauſe to be chiefly conſidered; and not the other, which was calculated for a different event that has not happened.

Now, this being taken for granted, it is an indiſputable point, that an obligation for payment of an annual ſum, which is to take place after the debtor's death, will affect his heirs principally; and the executors, if ſued on it, will be intitled to relief againſt the heir. This takes place, though the obligation has no reſpect to lands: and the reaſon is, that the executry is a limited ſucceſſion, which comprehends only the moveables that belonged to a defunct at the time of his death. They are ſuppoſed to be all contained in an inventory then taken up, and the extent of them to be aſcertained at that period; and therefore, if a defunct had obligations due to him that depended upon diſtant events, which might or might not exiſt after his deceaſe, ſuch obligations, though merely perſonal, will not fall under his executry: *e. g.* if he had acquired a liferent-annuity due to a third party, or had entered into a contract of victual for a tract of years, all ſuch obligations, *cujus dies cedit de anno in annum*, will fall to his heirs, and not to his executor; and, *è contra*, obligations of that nature will ultimately affect the heir, who is intitled to a permanent ſucceſſion, and not the executry, which comprehends only what is *in bonis defuncti* at the time, and cannot from the nature of the thing admit of a *tractum temporis*.

2*do*, *Alexander*'s taking the inveſtiture to the heirs in general, which would have made it go to the heir of the marriage, was a virtual implement of the contract.

" The Lords found, That in this caſe the heir is intitled to relief a-
" gainſt the executor." J. D.

For *David Mullo*, *Lockhart*. For *James* and *Robert Mullos*, *Ferguſon*.

N° CLIII.

N° CLIII. 22d *December* 1758.

MARGARET MACLELLAN, RELICT of HUGH HATHORN,

AGAINST

The CHILDREN and EXECUTORS of HUGH HATHORN.

Donatio inter virum et uxorem.

UPon the 4th *July* 1720, *Margaret Maclellan*, by contract of marriage, conveyed to her huſband, *Hugh Hathorn*, in conjunct fee and liferent, and to their children in fee, her portion, amounting to about *L.* 1000 *Scots*.

Some years after the marriage, *Margaret Maclellan* ſucceeded, as heir to her brother, to a debt of *L.* 3129, 8*s. Scots*, ſecured by adjudication, with intereſt from 1727; to which ſhe made up titles by granting a truſt-bond; upon which adjudication being led, the truſtee reconveyed it to her, and her huſband, for his intereſt.

Upon the 31ſt *December* 1754, with conſent of her huſband, ſhe executed a diſcharge and aſſignation of this debt in favour of the debtors, who made payment of 2644, 8*s. Scots* to the huſband, and granted bond to him for *L.* 4800 *Scots*, which was the balance, though the bond was expreſſed ſimply for borrowed money.

After her huſband's death, ſhe executed a revocation of theſe deeds, ſo far as they might be conſtrued to have conveyed any right in favour of her huſband, and brought an action againſt his children and executors for payment of the *L.* 2644, 8*s.* he had received, with intereſt from the time of his death; and alſo to have it declared, that the bond for *L.* 4800, with the intereſt from the ſame time, belonged to her. —— A proof was allowed, and ſeveral witneſſes depoſed, that the huſband actually received the *L.* 2644, 8*s.* and that the bond for *L.* 4800 was granted for the balance of the heritable debt, to which the wife had ſucceeded as heir to her brother.

Pleaded in defence, 1*ſt*, That where an heritable bond is diſcharged by a wife, and converted into caſh, not with a view of being again lent out and preſerved from the huſband's *jus mariti*, it becomes the immediate property of the huſband, in virtue of the legal aſſignation implied in marriage; and is not to be conſidered in the ſame light as a donation, revocable by the wife. This diſtinction was eſtabliſhed by a deciſion obſerved by Lord *Fountainhall*, 12th *February* 1686, Lady *Garvall*.

2*dly*, As the debt to which the wife ſucceeded as heir to her brother, conſiſted of *L.* 3129, 8*s.* of principal, contained in an adjudication, upon which intereſt was due from the year 1727 to the 31ſt *December* 1754, when it was diſcharged by the wife; ſuppoſing the wife intitled to revoke, yet her revocation could have no effect with regard

to the intereſt due for theſe years, which, at any rate, belonged to the huſband by his *jus mariti*.

Anſwered, There is no reaſon for a diſtinction between the caſe of a donation directly made by the wife, and the giving of a ſum of money to her huſband indirectly, as happened in this caſe. Nor was any ſuch imaginary diſtinction eſtabliſhed by the deciſion referred to; for, in that caſe, the wife had brought no other portion, except the heritable debt.

2*dly*, The annualrents due upon a ſum adjudged for, are conſidered as equally heritable with the principal debt; becauſe an adjudication is conſidered as a ſale under reverſion, redeemable by payment of the principal ſum and annualrents. And accordingly it was found, in the caſe of *Ramſay contra Clapperton*, 3d *February* 1738, that no part of the growing annualrents of a ſum adjudged for, was moveable, or did belong to an executor; *Dictionary*, *voce* Adjudication.

"The Lords adhered to the Lord *Auchinleck*'s interlocutor, finding, "That the bond for *L.* 4800 was a *ſurrogatum* in place of part "of the wife's heritable ſubject, and did therefore belong to her; "and that ſhe was alſo a lawful creditor for the *L.* 2644, 8*s.* re"ceived by her huſband, with intereſt upon both ſums from the "time of her huſband's death; and decerned." W. J.

Act. *Johnſtone.* Alt. *Montgomery.*

N° CLIV. 21ſt *July* 1758.

JAMES GRANT of DELAY, Purſuer,

AGAINST

GEORGE SMITH, Defender.

Sale of growing unripe corns, whether it transfers the property, ſo as to exclude the poſterior diligence of other onerous creditors?

James Grant of *Delay* was creditor by bill for *L.* 476 *Scots*, payable at *Whitſunday* 1753, to one *John Cuming* tenant in *Tombea* of *Glenlivat*.

Cuming, ſome time before ſowing the crop of that year, had contracted various debts, and become inſolvent.

The only ſubject of any value, for payment or ſatisfaction to his creditors, was the corn of that year's crop. Immediately after part of the corns were ſown, and afterwards, in the months of *June* and *July*, while the corns were yet green, *Cuming*, being preſſed by ſundry of his creditors, who were about to poind his effects in virtue of their diligences, agreed with ſeveral of them, and made partial ſales to them of ſo much of his growing corns in ſatisfaction of their debts; and ſoon after the defender, *George Smith*, who was to ſucceed *Cuming* in his farm, and conſequently needed the crop for ſtocking it, made a ſecond bargain with theſe creditors, and bought from them the particular ſhares which each of them had got. Theſe ſales were publicly and openly made, and the corns delivered to the buyers by a ſort of ſymbolical delivery on

on the ſpot, and underſtood to be afterwards on the riſk of the buyers.

The purſuer, thinking that ſales of this nature could be no bar to lawful diligence, proteſted his bill, and raiſed horning thereon; and, on the 14th and 15th days of the month of *September* following, when the corns were quite ready for being cut down, he proceeded to poind them as they ſtood upon the ground. But in the execution of this poinding he was ſtopped by the defender *George Smith*, who had purchaſed theſe corns from the creditors, and who had begun to cut them down.

The purſuer ſoon after brought a proceſs before the court againſt *Smith* for redreſs, and for having it found, that he had at leaſt an intereſt *pari paſſu* with the reſt of the creditors in theſe ſubjects, which had been carried off by partial ſales from the common debtor in defraud of his debt, which was the moſt conſiderable one.

Pleaded for the purſuer, The principles of equity, the genius of our law, and the practice of the court, unite to favour the claim of a juſt creditor, who has been cut out from ſharing, in proportion with the reſt, the only fund from which an inſolvent perſon's debts can be paid. Our law has moſt juſtly reſtrained the voluntary and partial deeds of an inſolvent debtor; and the court has never failed to redreſs this ſort of wrong and inequality, by bringing in all the creditors *pari paſſu*, where the preference aroſe from a total or conſiderable alienation made by the debtor, and the creditor aggrieved was not *in mora* to complain. It would be of very dangerous conſequence, if ſuch partial and premature ſales were to be held good, and allowed to exclude other onerous creditors, ſeeing the bulk of the tenants in this country, when they become inſolvent, have little or no other fund for payment of their debts but their crop upon the ground; and if they may lawfully and effectually diſpoſe upon it before it is grown, or almoſt exiſting, upon pretence of paying particular debts, the greateſt injuſtice would often be done. When corn is juſt ſown, and perhaps until it is cut down and reaped, the right of property is complete in the debtor's perſon; yet there is no known or eſtabliſhed courſe in law by which the juſt creditor can acquire or affect that right for ſecurity or payment of his debt: ſhall then the partial deeds of the debtor transfer a right which the law cannot reach? If ſuch ſales to particular creditors are to be held good, *a fortiori* a ſale of growing corns for ready money, to any friend or third party, knowing the debtor's inſolvency, will tranſfer the property; and ſuch purchaſer will be ſecure: And thus the debtor, wilfully to diſappoint his creditors, may effectually convey the only ſubject of their payment, before it is poſſible for them to affect it. In the preſent caſe, there neither was nor could be any real or ſymbolical delivery to complete the ſales; therefore the property remained with the debtor, and was lawfully affected by the purſuer's poinding: and at any rate, as thoſe ſales could not be completed, nor the property transferred to the purchaſer, till after they came to take poſſeſſion of the corns, by reaping them, which was after the purſuer's diligence by horning and poinding; therefore the ſales are plainly reducible upon the act 1621.

Anſwered for the defender, The ſales in queſtion were publicly made, and not clandeſtinely gone about, by interpoſed perſons, to give an unjuſt preference to particular creditors; ſome of *Cuming*'s creditors having

having their diligences ready to poind his effects, which would have made them preferable to this purſuer, the corns were fairly ſold to them in payment of their debts; and the ſales were completed in every ſhape they were capable of, from the nature of the thing. The corns were delivered over to the buyers, and remained upon their riſk, and ſervants were appointed by them to take care of them. That growing corns may be bought and ſold, and the property transferred, as was done in the preſent caſe, is agreeable to the opinion of all our lawyers, and the univerſal practice over the whole country; and if theſe ſales ſhould be reduced and rendered ineffectual, a very common and neceſſary branch of commerce would be ſtopped, to the great detriment of the public. The purſuer, in this caſe, has the leſs reaſon to complain of theſe ſales, which were openly made to onerous creditors, becauſe, after theſe partial purchaſes, there remained upon *Cuming*'s poſſeſſion other corns and effects more than ſufficient to have paid the purſuer's debt, and which he could eaſily have poinded for that purpoſe, without interfering with what had been allotted to the other creditors.

" The Lords ſuſtained the defences; and aſſoilzied." G. C.

Act. Fra. Garden. Alt. *Wal. Stuart.*

N. B. This caſe being omitted to be inſerted at the date of the interlocutor, is here inſerted at the end of the year.

N° CLV. 4th *January* 1759.

JAMES HARDIE,

AGAINST

GEORGE LIDDEL merchant in NEWCASTLE.

Effect of an arreſtment juriſdictionis fundandæ cauſa.

James Hardie applied to the ſheriff of *Roxburgh* upon the 21ſt *February* 1758, and obtained a *border-warrant*, authoriſing him, in common form, " to arreſt the perſon of *George Liddel* until he ſhould " find caution *judicio ſiſti et judicatum ſolvi*; and failing of his per- " ſon, all and ſundry his goods, gear, and debts, to remain under " ſure fence and arreſtment ay and while caution be found acted to " the effect foreſaid."

Purſuant to this warrant, *Hardie* uſed arreſtment in the hands of certain perſons reſiding in *Kelſo*, as debtors to *Liddel*, and then executed a ſummons at the market-croſs of *Edinburgh*, pier and ſhore of *Leith*, againſt *Liddel*, concluding againſt him perſonally for payment of a debt of *L.* 18. In this ſummons he did not libel upon the warrant.

Liddel appeared, and *pleaded*, 1*mo*, That as the warrant was not libelled on, it could give no ſupport to the ſuit.

2*do*, That the effect of ſuch warrant could only be, as the words of it bear, to detain the perſon, goods or effects, of the foreigner, till he ſhould

ſhould prorogate the juriſdiction by finding caution; but that if he choſe to lie in jail, or to abandon his goods, nothing further could be done. And if this were not the rule, it would be eaſy to found a juriſdiction, and obtain a decreet againſt a ſtranger perſonally for payment, though he had no effects here, by only uſing arreſtment in the hands of perſons as debtors to him, who really owed him nothing.

3*tio*, That border-warrants cannot be granted for every ſort of debt, like arreſtments againſt ſtrangers, proceeding from the court of ſeſſion; becauſe they reſemble acts of warding, which can be iſſued for ſecuring tavern and hoſtlery bills only.

4*to*, An arreſtment by the authority of a ſheriff cannot be the foundation of a ſuit before the court of ſeſſion.

Anſwered, 1*mo*, The effect of the arreſtment on a border-warrant is to fix or detain in this country the effects of a ſtranger, the conſequence of which is, to ſubject him to the juriſdiction of the courts here, as much as if he had a land-eſtate; and therefore he may be ſued in the ſame manner as a native.

2*do*, There is no neceſſity, in order to found the juriſdiction, that the ſtranger ſhould find caution; for, by fixing his goods within the territory, he is immediately ſubjected to anſwer; and the alternative of caution expreſſed in the warrant, is in favour of the ſtranger, that he may relieve his effects, if he pleaſes, by finding ſecurity. Thoſe who have no effects here, cannot be thus ſubjected; for if debts, as in this caſe, are arreſted, the court will only decern in a forthcoming againſt the arreſtees, after aſcertaining the claim againſt the ſtranger, to that particular effect; and if the arreſtees ſhould owe nothing, the proceedings would be ineffectual.

3*tio*, No authorities are quoted to prove, that border-warrants can be iſſued for ſecuring tavern and hoſtlery bills only. The univerſal practice has been, to grant them for every ſort of debt; and it would be impoſſible to apply to the court of ſeſſion for warrants of this ſort without loſing the opportunity of uſing them.

4*to*, An arreſtment by authority of the ſheriff, as it has the effect to fix and detain the ſtranger or his effects in *Scotland*, muſt eſtabliſh the juriſdiction of the ſupreme court of *Scotland*, in the ſame manner as it eſtabliſhes the juriſdiction of the ſheriff himſelf.

" The Lords found, That the arreſtment on the ſheriff's warrant " founded a juriſdiction to the court of ſeſſion; and remitted to " the Lord Ordinary to proceed accordingly." W. J.

Act. *P. Murray.* Alt. *H. Dalrymple.*

N° CLVI. 8th *January* 1759.

MARION WARNOCH,

AGAINST

MARGARET MURDOCH.

Jus quæſitum tertio.

James Glen, in his marriage-contract with *Margaret Murdoch*, 31ſt *May* 1751, provided her to a certain annuity after his death, payable at two terms in the year, to which was ſubjoined this clauſe: "But "in caſe that *Marion Warnoch*, ſtepmother of the ſaid *James Glen*, and "widow of the deceaſed *John Glen* merchant in *Glaſgow*, his father, "ſhall ſurvive the ſaid *James Glen*, and that the ſaid *Margaret Murdoch*, "his future ſpouſe, be then alſo alive, then ſhe and her annuity, in e-"very event, ſhall be burdened with, and ſhe, with conſent foreſaid, "obliges herſelf to pay, the ſum of *L.* 12 *Sterling* yearly to the ſaid "*Marion Warnoch*, from the ſaid annuity, at the terms before ſpecified "for payment of the ſaid *Margaret Murdoch*'s annuity, and beginning at "the ſame time, and that during the joint lives of the ſaid *Margaret* "*Murdoch* and *Marion Warnoch* allenarly."

In *December* 1756, *James Glen* executed a ſettlement of his affairs, by which he divided his fortune amongſt his children. This ſettlement contained the following clauſe: "But as to a gratuitous annuity of *L.* 12 "*Sterling* yearly, mentioned in my contract of marriage, and intend-"ed to be given by me to *Marion Warnoch*, my ſtepmother, and with "which I burdened my wife and her annuity, as ſpecified in the ſaid "contract, I do hereby, for good reaſons, revoke, recall, and make "void the ſaid proviſion of *L.* 12 *Sterling* yearly, in favour of the ſaid "*Marion Warnoch*; declaring, that the ſaid *Margaret Murdoch*, and "her annuity and proviſions, and my eſtate and ſucceſſion, ſhall be "as free of the ſaid *L.* 12 *Sterling*, as if the ſame had never been men-"tioned in the ſaid contract."

James Glen died very ſoon after executing this ſettlement; and *Margaret Murdoch* his wife refuſed to make payment to *Marion Warnoch* his ſtepmother of the *L.* 12 of annuity; becauſe it had been diſcharged by her huſband's laſt ſettlement.

An action was brought againſt her by *Marion Warnoch*, upon this ground, That by the clauſe firſt recited in *James Glen*'s contract of marriage, a right was eſtabliſhed in favour of the purſuer, his ſtepmother, which it was not thereafter in his power, with the concurrence of his wife, to revoke, without the conſent of the ſtepmother; for that when a right in favour of a third party is expreſſed in a contract between two perſons, the right is effectual to that third party, though not preſent nor accepting, and it cannot be recalled; but that third party may compell either of the contractors to exhibit the contract, and thereafter may inſiſt for performance. This is clearly ſet forth to be the law of *Scotland* by Lord *Stair*, *b.* 1. *tit.* 10.

§ 5.

§ 5. and it is ſupported by various deciſions; 9th *January* 1627, *Supplicants*; 25th *June* 1634, *Renton*; 18th *December* 1633, Biſhop of *St Andrew's*.

Anſwered, The proviſion in favour of the purſuer was gratuitous; ſhe was no party to the contract, and the ſtipulation was entirely between *James Glen* and his wife; it was ſubmitted to by the wife, not upon account of *Marion Warnoch*, but upon account of her own huſband; the ſtipulation was a voluntary eventual burden, created by him upon his wife's annuity: And no good reaſon can be figured, why he might not again free his wife's annuity of that burden, when he found reaſon, or choſe to do ſo; for he never could mean, that it ſhould not be in his own power, if he ſaw cauſe, to relieve his wife of that burden. *James Glen* and his wife had it certainly in their power to have deſtroyed their contract of marriage by joint conſent, and to have entered into a new contract, in which they were not obliged to inſert this burden. Beſides, no deed can be effectual without delivery; and, in this caſe, there was no delivery to *Marion Warnoch*, nor was the deed even put into the regiſter, which is held to be a general delivery to all parties intereſted. If it is ſaid, That the delivery of the contract of marriage by the wife to *James Glen* muſt be held as a delivery to him, for the behoof of *Marion Warnoch*; the contract cannot, even upon this footing, have a ſtronger effect, than if he had taken a bond from his wife for payment of this annuity to his ſtepmother; in which caſe, he might certainly have given up or diſcharged that bond at his pleaſure: his wife was bound, but he himſelf was not; and he was at liberty to diſcharge the obligation upon her.

The Lord *Bankton* Ordinary "found, That the defender muſt take "her liferent, with the proper burdens, as there ſtipulated; and "therefore repelled the defence; and decerned for payment of the "*L.* 12 *Sterling* yearly."

"The Lords adhered." W. J.

Act. *J. Dalrymple.* Alt. *T. Miller.* Clerk, *Pringle.*

N° CLVII. 8th *January* 1759.

THOMAS FRASER of GLENVACKY, claimant on the eſtate of *Lovat*,

AGAINST

His MAJESTY's ADVOCATE.

Jus tertii.

UPon the 14th *June* 1694, *Hugh* Lord *Fraſer* of *Lovat* granted an heritable bond or wadſet-right, containing a precept of ſeiſin, to *Thomas Fraſer* brother of *Belladram*, for *L.* 1000 *Scots*; for ſecurity of which ſum Lord *Lovat* became bound to infeft him in the lands of *Glenvacky*, under reverſion, and for payment of a ſurplus-duty therein mentioned.

—*Thomas*

—*Thomas Fraſer* was infeft 27th *October* 1696, and his ſeiſin duly recorded 2d *December* 1696.

Thomas Fraſer entered on poſſeſſion of the lands, and paid regularly the ſurplus-duty. About the year 1702, he made a tranſaction with *William Fraſer* of *Teanakyle*; by which, for a valuable conſideration, he diſponed to *Teanakyle* his wadſet of *Glenvacky*. But neither this conveyance, nor infeftment upon it, were produced. — It was proved, however, that *Teanakyle* entered on the poſſeſſion of the lands, and continued to poſſeſs them from the year 1702 to the year 1745, when he died, and made payment regularly of the ſurplus-duty.

Teanakyle, ſome time before his death, conveyed this wadſet-right to *Thomas Fraſer* his ſon, who was infeft 19th *Auguſt* 1745.

The eſtate of *Lovat* having been forfeited and ſurveyed, an abſtract of the ſurvey was recorded in exchequer, which, with reſpect to the lands of *Glenvacky*, contained theſe words: "*Thomas Fraſer* of *Glen-*
"*vacky* of ſurplus-rent for his lands of *Glenvacky* wadſet to him for
"1000 merks, *L.* 20, one cuſtom-cow, one wedder, one lamb, and
"ſixty loads of peats."

Thomas Fraſer entered his claim, in order to have the miſtake in the abſtract of the ſurvey rectified, by which the wadſet-ſum was ſtated as 1000 merks in place of *L.* 1000.

It was *objected* for his Majeſty's advocate, That the claimant had not produced the conveyance from the original wadſetter to *Teanakyle*, the claimant's father, nor the infeftment upon that conveyance; and therefore the claim muſt be diſmiſſed: for that a proof, if brought, of his and his father's poſſeſſion, could not conſtitute an heritable right; and nothing could ſupply the want of the intermediate conveyance to his father, but a proving of the tenor: That the crown had an obvious title and intereſt to plead this objection; becauſe, if the claimant could not ſhow a good title to this wadſet-right, it would be cut off by preſcription, and likewiſe by the veſting act, as not claimed on.

A diligence was granted for recovering the writings which were wanted, and a proof was allowed of the claimant and his predeceſſors poſſeſſion of the lands. The poſſeſſion was clearly proved; but the writings were not recovered. It was however proved, that the claimant, ſeven years before, had received a blow on the head, which had deprived him of his judgment, ſo that he could give no information where his papers had been lodged.

It was *anſwered* to the objection, That it was not the intention of the veſting act, to oblige thoſe who upon legal titles were in poſſeſſion of lands forfeited, to enter claims: That accordingly neither feuers, wadſetters, nor tenants, whoſe rights have been conſtantly ſet forth in the ſeveral ſurveys, have ever been adviſed to enter claims: That, in this caſe, the claimant's lands of *Glenvacky* were only ſurveyed to the extent of the ſurplus-duty, and to the extent of the right of reverſion: That the purpoſe of entering a claim, was only to rectify a miſtake with reſpect to the extent of the wadſet-ſum; and that therefore the court had only to take cogniſance of that miſtake; and if any objections lay againſt the claimant's titles, they would be judged of afterwards, when the lands came to be redeemed by the crown.

2*dly*, The objection is founded upon the want of intermediate conveyances, which might be an objection competent to the heirs of the

the original wadſetter, but cannot be competent to the crown, which derives no right from theſe heirs. The objection would have been *jus tertii* to the forfeited perſon, and muſt be ſo to the crown, as in his right. It is proved by evidence on record, that the forfeited perſon was denuded of this right in the year 1696; and therefore, if the wadſet-right is not in the claimant, it muſt be in the heirs of the original wadſetter. This is a general point of law, which has been often decided; 3d *December* 1701, *Forbes contra Udny*, *Dictionary*, *voce Jus tertii*. The ſame general point was eſtabliſhed in a late remarkable caſe. *Jacobina Clark* brought a proceſs againſt the Earl of *Home* and his tenants, founded upon an appriſing led againſt the eſtate of *Home* by *Helen Trotter* in 1655, to which *David Clark* her father had made up a title by adjudication led againſt *Helen Trotter*'s heirs in 1724. The Earl made various objections to *Clark*'s adjudication; as, That the debts upon which it was led were preſcribed; That proper titles had not been made up by the adjudger to theſe debts by ſervice and confirmation, *&c.*; and if he had prevailed in theſe objections, the effect would have been, that *Helen Trotter*'s appriſing would have been preſcribed. But the court unanimouſly found, 27th *January* 1747, "That it was not competent "to the Earl of *Home* to object to the titles of the purſuer *Jacobina* "*Clark*." This interlocutor was affirmed upon an appeal; and the reaſon of appeal pleaded in that caſe was as follows: "Becauſe the ſcope "of this action being to diſpoſſeſs the Earl of *Home* of his eſtate, and "to have his tenants decreed to pay their rents to *Jacobina Clark*, the "Earl has an undoubted intereſt to move every objection to her ti"tle, that he be not diſpoſſeſſed of his eſtate at the ſuit of one who "has no legal title or right."

And therefore, in the preſent caſe, it will not ſupport the objection in favour of the crown, to ſay, That if the claimant's right is ſet aſide, the right of the original wadſetter will be preſcribed, or that it will be cut off by the veſting-act, for default of entering a claim. This argument will no more intitle the crown to plead in the right of a third party, than the preſcription which would have been run againſt *Helen Trotter*'s right, was found to ſupport the Earl of *Home*'s plea againſt *Jacobina Clark*.

"The Lords ſuſtained the claim upon the claimant's producing a "diſpoſition in his favour from the heirs of the original wadſet"ter." W. J.

For the claimant, *Johnſtone*. Alt. Crown-lawyers. Clerk, *Juſtice*.

N° CLVIII. 9th *January* 1759.

MARY WALLACE, and others,

AGAINST

JANET MURRAY.

Action refuſed on a bill which had lien over thirty years.

Mary Wallace and others, as executors of the deceaſed *James Finlayſon*, moved an edict before the commiſſaries of *Edinburgh*, in or-

der to obtain themſelves confirmed executors-creditors to *John Murray*, one of the principal clerks of ſeſſion, on a bill for *L.* 40, accepted by *John Murray* 7th *Auguſt* 1724, and payable to *James Finlayſon*, who was an extracter in *Dalrymple*'s office.

Janet Murray, the daughter of *John Murray*, *alledged*, That this bill was not a legal document of debt, and could not be ſuſtained as a title of confirmation, as it had lien over for thirty years without diligence done upon it, and had not been homologated by payments of intereſt, or otherwiſe: That there were alſo ſtrong preſumptions that it had been paid; for that *James Finlayſon* was in uſe to receive the clerk's dues, and to pay them to Mr *Murray*; and if this bill had been really due, he muſt have retained payment of it out of theſe dues.

It was *anſwered*, That bills are probative by act of parliament; and as no preſcription of them is eſtabliſhed ſhorter than the long preſcription of forty years, they are legal documents of debt within that period. The preſumption of payment ariſing from the long taciturnity, can be of no weight in this caſe; for *James Finlayſon*, being an extracter in the ſame office with Mr *Murray*, was of courſe much under his ſubjection, and would not incline either to raiſe diligence on this bill, or retain payment of it out of Mr *Murray*'s dues of office.

It was *alledged*, That Mr *Murray* had, ſome time before his death, acknowledged the debt to be reſting owing; and ſeveral witneſſes being examined, they deponed *negatively*.

The commiſſaries ſuſtained the objections to the bill, and refuſed to confirm the movers of the edict. The purſuers applied to the court of ſeſſion by bill of advocation.

"The Lords refuſed the bill of advocation, and remitted the cauſe "*ſimpliciter* to the commiſſaries." W. J.

For Murray, *Lockhart*. Reporter, Lord Juſtice-Clerk.

N° CLIX. 13th *January* 1759.

CREDITORS of ALISON of DUNJOP,

AGAINST

AGNES and MARGARET AUCHINLECKS.

Objections to an adjudication: Accumulate ſum blank;—Pluris petitio;—*Payments to the relict and apparent heir*, &c. *of the adjudger, how far ſuſtained?*

IT was *objected* by the competing creditors of *Dunjop*, againſt an adjudication produced for *Agnes* and *Margaret Auchinlecks*, which had been led by *Robert Auchinleck* their grandfather, That the accumulate ſum was blank in the decreet of adjudication.

"The Lords, upon adviſing petition and anſwers, found, That the "accumulate ſum not being filled up, is no nullity in the adjudi-"cation."

It

It was further *objected*, That allowance had not been given for certain rents poſſeſſed by *Robert* the adjudger, before the date of the adjudication: And the fact being clearly proved,

" The Lords found, That the adjudication can only ſubſiſt as a ſe-
" curity for the principal ſum, annualrents, and neceſſary expen-
" ces, accumulated at the date of the adjudication, and the in-
" tereſt thereafter."

Robert, the adjudger, continued in poſſeſſion of the rents after the adjudication, till his death in the year 1718. *John*, his ſon, then entered to the poſſeſſion of two thirds, and *Robert*'s widow of one third, during her life; and after *John*'s death, his widow continued in poſſeſſion of the lands, and kept her two daughters, *Agnes* and *Margaret*, in family with her. Thereafter *Agnes*, one of the daughters, married *Samuel Auchinleck*; and he entered to the poſſeſſion, firſt of a part of the lands, and ſoon after of the whole, and continued in poſſeſſion till *Whitſunday* 1755.

The competing creditors *inſiſted* againſt *Agnes* and *Margaret*, who now claimed upon the adjudication, That the ſeveral poſſeſſions of *John* the apparent heir, of *Robert* the father's widow, and of *John*'s widow, and of *John*'s daughters, before they made up titles to the adjudication, muſt all be imputed in extinction of the ſums contained in the adjudication.

Anſwered, *John* had no right to the adjudication during his apparency; much leſs had his widow, or the widow of his father, any pretence of right; and his daughters never poſſeſſed but under his widow, from whom they obtained the poſſeſſion.

Replied, *John*, as apparent heir, had an undoubted right to the annualrents of the adjudication; and therefore the rents received by him muſt be imputed in extinction of theſe; and as the competitors cannot make up a title to the adjudication, without paſſing by *John*, who was above three years in poſſeſſion, they muſt be anſwerable for the whole of his intromiſſions.

As to *Robert*'s widow, her right ſtood thus: *Robert*'s adjudication proceeded in part upon an heritable bond, upon which he ſtood infeft; and his widow was by law intitled to a terce of the annualrent of that bond; and therefore her intromiſſion muſt, to that extent, impute in payment of the adjudication.—— 2*do*, If ſhe was intitled to any further liferent-proviſion from her huſband, her poſſeſſion muſt impute to the extent of her full proviſion; becauſe the heirs of her huſband, now claiming upon the adjudication, have no intereſt to object to the imputation of a ſum which ſhe uplifted out of the only fund ſhe had acceſs to, for her payment of a debt which they and their father *John* were bound to make good to her as repreſenting *Robert*.—— 3*dly*, *Agnes* and *Margaret* had intromitted with their grandmother's effects; and therefore cannot diſpute allowance of the intromiſſions ſhe had with the rents of this ſubject.

As to *John*'s widow, though ſhe was not intitled to a terce, yet any liferent-proviſion made to her by her huſband would be ſufficient to make her intromiſſions impute; becauſe *John*'s daughters, who repreſent him, by paſſing by him, and ſerving to their grandfather, cannot object to her having recovered her alimentary proviſion, by continuing

nuing to poſſeſs the lands which her huſband had poſſeſſed. Nay, ſuppoſing no liferent-proviſion, ſhe was intitled to an aliment from *Agnes* and *Margaret*, both as being her children, and as repreſenting their father; and if her intromiſſion were not to impute, the burden of her aliment would be thrown upon the other creditors. But further, as her two daughters lived in family with her, the greateſt part of the rents muſt have been applied to their aliment and education: and though they were then minors, and their titles not made up; yet their poſſeſſion as apparent heirs, muſt have the effect to extinguiſh the debt, at leaſt to the extent of the annualrents of the adjudication; and the mother muſt be conſidered as having acted as pro-tutor for them.

From the time *Samuel Auchinleck* entered to the poſſeſſion, there can be no doubt, that the rents muſt be imputed in extinction of the adjudication. If he had even paid the rent to his mother-in-law, the widow of *John*, it would not alter the caſe, as his wife had the right to theſe rents in preference to her mother; and therefore he could not plead upon ſuch undue payment.

"The Lords found the rents during the life of *Robert Auchinleck* im-
" pute; alſo thoſe during the life of *John*; alſo the intromiſſions
" of the widow of *Robert*, to the extent of the third of the annual-
" rent-right, of which ſhe had a terce: but found that the intro-
" miſſions of the widow of *John* do not apply." W. J.

For the creditors, *Ferguſon*.

N° CLX. 31ſt *January* 1759.

JOHN BALLINGALL and other CREDITORS of FRANCIS HENDERSON of *Grange* of *Barrie*,

AGAINST

THOMAS, WILLIAM, and JEAN HENDERSONS, YOUNGER CHILDREN of the ſaid FRANCIS HENDERSON.

An obligation in a marriage-contract to pay a ſum to younger children at a term during the father's life, conſtitutes them proper creditors.

BY marriage-contract, dated 26th *June* 1738, between *Francis Henderſon* and *Jean Reid*, with advice and conſent of their reſpective fathers, *James Henderſon*, the father of *Francis*, in conſideration of the bride's portion of 6000 merks, diſponed the eſtate of *Grange* of *Barrie* to his ſaid ſon *Francis*, and the heirs-male to be procreated between him and the ſaid *Jean Reid*; whom failing, to *Francis*'s heirs and aſſignees whatſomever.

The ſaid contract likewiſe contained the following clauſe. "Sick-
" like, if there ſhall happen to be a male child procreate in this in-
" tended marriage, who, by the conception of this preſent contract,
" *ſhall* ſucceed to the lands of *Grange* of *Barrie*, in that caſe the ſaid
" *Francis Henderſon* binds and obliges him, and the ſaid male child,
" thankfully

" thankfully to content, pay, and deliver, to the younger children to " be procreate betwixt him and the ſaid Mrs *Jean Reid*, the portions and " proviſions following, *viz.* If there be only one child, to the ſaid child " the ſum of 3000 merks *Scots*; if two children, to them 4000 merks; " and if three or more children, to them 6000 merks; which portions " and proviſions are to be divided amongſt the ſaid children as the " ſaid *Francis Henderſon* ſhall think fit to appoint by a writ under his " hand; and *they are to be due and payable to them at their reſpective* " *majorities or lawful marriages, either of them firſt happening, with an-* " *nualrent thereafter:* and the ſaid *Francis Henderſon*, during his life- " time, and his eldeſt ſon after his deceaſe, are hereby bound to ali- " ment and educate the ſaid younger children honeſtly, conform to " their rank and quality, ay and while their ſaid proviſions fall due. " But if it ſhall happen that there be no male children procreate in " this intended marriage, and only daughters procreate therein, and " that the ſaid *Francis Henderſon* ſurvive the ſaid Mrs *Jean Reid*, and " have male children in a ſecond marriage, then, and in that caſe, " the ſaid *Francis Henderſon* binds and obliges him, his heirs and ſuc- " ceſſors, thankfully to content, pay, and deliver, to the daughters to " be procreate betwixt him and the ſaid Mrs *Jean Reid*, the portions " and proviſions following, *viz.* If there be only one daughter, to her " the ſum of 7000 merks; if two daughters, to them 9000 merks; " and if three or more daughters, to them 11,000 merk *Scots*; which " portions and proviſions are to be divided amongſt the ſaid daughters, " as the ſaid *Francis Henderſon* ſhall think fit: and the ſaid *Francis* " *Henderſon* does hereby bind and oblige him, his heirs and ſucceſſors, " to make payment of the ſaid proviſions to the ſaid daughters, at " their majorities or lawful marriages, either of them firſt happening, " with annualrent thereafter, and to aliment and educate them ho- " neſtly, conform to their rank and quality, until their ſaid portions " fall due."

Of this marriage, beſides the eldeſt ſon, there exiſted three younger children, *viz.* two ſons, *Thomas* and *William*, and one daughter *Jean*.

Francis, the father, having contracted ſundry debts, his creditors adjudged his eſtate; and his three younger children alſo adjudged the ſame within the year of the firſt adjudication, for payment of 6000 merks, as due to them in virtue of the firſt part of the clauſe in the marriage-contract above recited.

A ranking of *Francis Henderſon*'s creditors enſued, where the queſtion occurred, Whether the younger children were or were not intitled to be ranked as onerous creditors *pari paſſu* with the other adjudgers?

Pleaded for the other creditors, 1*mo*, The eldeſt ſon of the marriage, whoſe intereſt is ſuppoſed to be chiefly attended to at ſettling the contract, is only called to ſucceed to the lands as heir of proviſion to his father; and, conſequently, his father's onerous creditors are preferable to him. Now, he being the perſon ſubjected in payment of the younger children's proviſions, in the event of his ſucceeding, it follows, that thoſe proviſions are only a burden upon his right of ſucceſſion; and therefore muſt ſhare the ſame fate with it. 2*do*, By the conception of the contract, the proviſions to the younger children are not due till both the term of payment is come, *viz.* marriage or majority, and alſo the condition under which they are ſtipulated has exiſted, namely, that a

male child of the marriage has actually ſucceeded to the eſtate, in virtue of the ſettlement contained in the contract. The words are, "If "there ſhall happen to be a male child procreate *who ſhall ſucceed*," &c.; which import, not only, that a male child muſt be born of the marriage, but that ſuch a child muſt *de facto* ſucceed to the eſtate, before the proviſions to the younger children are payable. Now, as ſuch ſucceſſion cannot open to the ſon before the father's death, the proviſions cannot be payable till after his death; which is a conſtruction likewiſe agreeable to the words of the obligation on the father during his lifetime, and on his eldeſt ſon after his deceaſe, to aliment the children till their portions ſhould become due; indicating, that they would not fall due in the father's time.

If it is thus clear, that, by the firſt branch of the clauſe under which the children now claim, their portions are not payable till after the death of their father, who is ſtill alive; then it follows, that they muſt be conſidered as heirs of proviſion, and cannot compete with his onerous creditors; as has been adjudged in many caſes; 24th *January* 1677, *Graham*; 24th *July* 1696, and 17th *June* 1697, *Napier*; and 1ſt *July* 1754, *Strachan*. And,

3*tio*, The proviſions made in different parts of the clauſe to the younger children, and to the daughters of the marriage, are evidently intended to take effect in different events, and not to have both place: but as the father may yet marry a ſecond wife, and have a ſon by her; and as the ſons of the firſt marriage may all die before him, whereby the proviſion made for the daughter of that marriage, in the after part of the clauſe, might become due, it is obvious, that the proviſions made in the firſt event, and which are now claimed, may ſtill fall to the ground; and, conſequently, being thus precarious while the father lives, the ſame muſt be conſidered as proviſions made payable after the father's death, and ſo fall to be poſtponed to his onerous creditors.

Anſwered for the children, 1*mo*, The ſettlement of the eſtate on the heir-male of the marriage is a proviſion of ſucceſſion which the eldeſt ſon could only take by ſervice, ſubject to the father's onerous debts; but the portions of the younger children are conſtituted by the father's perſonal obligation. Theſe are not burdens on the fee provided to the heirs-male, but debts due by the father himſelf, and to which the heir of the marriage can only become liable by ſucceeding in his father's place.

2*do*, The portions are made payable at preciſe periods, *viz.* marriage or majority, which might come, and have accordingly arrived, during the father's life. If at ſuch term of payment the father was living, the portions were exigible from him, or if dead, from his eldeſt ſon. The proviſo, that the aliment to be furniſhed till marriage or majority ſhould then ceaſe, further ſhows, that the portions were then intended to become due, although the father ſhould be ſtill alive. Nor do the words in the beginning of the clauſe, "If there ſhall happen to be a "male child procreate—who *ſhall* ſucceed," import a condition ſuſpenſive of the payment of the portions provided to the younger children till an heir-male of the marriage had actually ſucceeded. Theſe words are only deſcriptive of the circumſtances of the family under which leſſer portions ſhould be due, than thoſe provided in the after

ter part of the clauſe on the failure of iſſue-male of the marriage. If there was a male child exiſting at the time the portions became exigible, who *ſhould* or *might* ſucceed by conception of the contract, then the obligation to the younger children was evidently intended to be performed, and the father was bound to pay accordingly the ſums provided in ſuch event. The portions being thus payable eventually by the father in his own lifetime, were truly a juſt and onerous debt due by him; and conſequently intitled to be ranked on his eſtate, conform to the diligence done for ſecuring the ſame, equally with his other onerous contractions; agreeable to the deciſion in a ſimilar caſe, 24th *January* 1724, Creditors of *Eaſter Ogle*. And, 3*tio*, Though it is true, the different proviſions made in this clauſe are intended to take place in different events; yet that cannot affect the queſtion. The leſſer portions, if already due, may certainly be axacted, although it is ſtill poſſible that the other event may afterwards exiſt, in which the larger portions may become due. In that caſe, what the children now receive, will be imputed in ſatisfaction *pro tanto* of their augmented proviſions.

Some of the Lords were of opinion, that the condition of a male child's ſurviving the father was ſuſpenſive of the payment of the portions to any of the younger children till the father's death; becauſe it could not be ſooner known with certainty, that a male child, either of that or a ſubſequent marriage, would ſucceed to the eſtate; and therefore that the younger childrens proviſions being precarious and fluctuating till that event, they could not be conſidered as proper creditors to their father in his lifetime.

But the majority of the court held the deſcriptive words in the contract, "male child who *ſhall* ſucceed," to import the ſame as "male "child who *ſhould* ſucceed;" and that a male child having exiſted when the term of payment of the younger childrens portions came, the ſituation of the family at that period was to be regarded; and therefore that the father having, in the event which has happened, made himſelf a debtor to the children in his own lifetime, they are to be conſidered as proper creditors, and ranked according to their diligence.

"The Lords found the younger children intitled to be ranked con-
"form to their diligence, along with the other creditors upon
"their father's eſtate." D. R.

For the creditors, *Ferguſon, Dav. Græme.* For the children, *Rae, Macintoſh, Lockhart.*
Reporter, *Bankton.* Clerk, *Pringle.*

N° CLXI.

N° CLXI. 6th *February* 1759.

MARY COLLINS,

AGAINST

LORD BOYD.

A perſon reſiding without the juriſdiction of the court, cannot be received as a judicial cautioner.

IN the queſtion betwixt *Mary Collins* and her truſtees againſt Lord *Boyd*, N° 155. the court ordered Lord *Boyd* to pay the whole ſum to the purſuer, on her finding caution, that *Janet Boyd*, the nun, would never claim her ſhare due by Lord *Boyd*.

Lord *Boyd objected* to the cautioner, That he did not live within the juriſdiction of the court; and that as this was a judicial act or obligation, the cautionry being ordered by the court, no cautioner could be received who was not amenable to it.

Anſwered, This is not a *cautio judicio ſiſti et judicatum ſolvi*. It is not properly a judicial act or obligation. It is a common cautionary obligation, that a perſon living in a convent ſhall not claim her ſhare of the money due by Lord *Boyd*; and therefore any reſponſible perſon may be received as cautioner, whether amenable to this court or not.

" The Lords refuſed to accept of a cautioner reſiding out of the " kingdom." J. C.

For Lord, *Boyd*, *Lockhart*.

This queſtion was adviſed upon a report, without any pleading, or any papers given into court upon it.

N° CLXII. 7th *February* 1759.

THOMAS BOSWAL writer in *Edinburgh*,

AGAINST

MARGARET ARNOT.

1. *Narrative of a deed* inter conjunctos *does not prove oneroſity.* 2. *A perſonal bond, bearing an excluſion of aſſignees, cannot be gratuitouſly aſſigned.*

Robert Paterſon, commiſſary-clerk of *Peebles*, on the 6th *June* 1700, granted bond to Sir *Hugh Paterſon* of *Bannockburn* for 2000 merks; and Sir *Hugh*, by his backbond, of the ſame date, declared, " That " the bond was granted to him in truſt, for behoof of *Mary* and *Mar-*

" *garet*

" *garet Paterſons*, and obliged himſelf to make the ſame forthcoming " to them, their heirs and executors, *ſecluding their aſſignees*."

Mary Paterſon married *Andrew Dick*, and by him was mother to another *Andrew*.—*Margaret* died unmarried.

Margaret, in *May* 1708, executed a diſpoſition *omnium bonorum*, to and in favour of her ſiſter *Mary*, and *Andrew Dick* her huſband, and their heirs, executors, or aſſignees. This deed bore to be granted " for " *certain ſums of money* advanced for the granter by her ſiſter *Mary* and " her huſband, and for certain other good deeds, *onerous cauſes*, and " conſiderations, done and performed by them to her." It conveyed all the granter's effects, debts, *&c. per averſionem*, without any ſpecification, and bore no reſervation of a liferent.

Margaret lived about ſix years after granting the diſpoſition, and upon her death, *Mary*, her ſiſter, was confirmed executrix *qua neareſt of kin* to her; but under expreſs proteſtation, " That the confirmation " ſhould not be in prejudice of the aforeſaid general diſpoſition."

Soon after the confirmation, Sir *Hugh Paterſon*, the ſon and repreſentative of the original truſtee, granted a retroceſſion of the bond above mentioned to *Mary Paterſon*, as having right to her ſiſter's half as executrix to her.—A proceſs was then brought, and decreet obtained, in the names of the wife, and the huſband, *for his intereſt*, againſt *Hugh Paterſon*, the ſon and repreſentative of the original debtor; and in the 1718, *Hugh* granted to the wife and her huſband a bond of corroboration, by which he conveyed, in ſecurity of this debt, an heritable debt belonging to him upon ſome houſes in *Canongate*. But a few days after obtaining this additional ſecurity, *Andrew Dick* the huſband did, without his wife's concurrence, grant a backbond, reſtricting the debt corroborated to 2000 merks, and intereſt from *Candlemas* then next, by which a great many years annualrents were diſcharged.

Andrew Dick, the huſband, afterwards executed ſundry deeds and ſettlements relative to this debt, in quality of abſolute fiar of it. But after his death and that of his wife, *Andrew Dick*, their eldeſt ſon, made up a title as heir to his mother, and thereupon diſponed the whole debt to *Thomas Boſwal*.—*Margaret Arnot*, as having right from *Hugh Paterſon* the debtor to his heritable debt above mentioned, burdened with the ſecurity he had given to *Mary Paterſon*, inſiſted to have that ſecurity reſtricted in terms of *Andrew Dick*'s backbond.

Pleaded for *Boſwal*, *Dick* the huſband had no right of this debt veſted in him: and conſequently could not habily reſtrict it. For, 1*mo*, *Mary Paterſon* was originally creditor in one half of the debt, and upon her ſiſter *Margaret*'s death, ſhe ſucceeded to the other half.—*Margaret*'s general diſpoſition to *Mary* and her huſband could not veſt the fee of any part of the debt in the huſband; becauſe by the tenor of Sir *Hugh Paterſon*'s backbond, it was provided to the two ſiſters, *ſecluding their aſſignees*. Beſides, 2*do*, The confirmation of *Mary* as executrix *qua neareſt of kin* to her ſiſter, with the ſubſequent deeds and diligence executed in the ſame ſtyle, abundantly prove the ſenſe of the huſband himſelf at that time, that he had no good right under the diſpoſition; and ſuch confirmation having at any rate veſted the total right of the debt in the wife, which was afterwards made heritable in her perſon, her ſon properly made up his titles as heir to her, and effectually conveyed the

whole to Mr *Boſwal*, unaffectable by the deeds of his father, whom he did not repreſent.

Anſwered for *Arnot*, 1*mo*, *Mary Paterſon* could at the utmoſt only have right to the fee of three fourths of the debt, *viz.* two fourths in her own right, and another fourth in virtue of the general diſpoſition; which being a conveyance of a ſubject then moveable, veſted the fee equally in the huſband and wife; and conſequently gave him right to the remaining fourth. The ſecluſion of aſſignees in Sir *Hugh Paterſon*'s backbond, is no more than a mutual ſubſtitution, which might be defeated for *onerous*, and even for *rational* cauſes; as was found in ſeveral caſes collected in the *Dictionary*, Title, *Implied condition*; and 22d *December* 1752, *Wauchope contra Gibſon*. The diſpoſition proves itſelf to have been made for onerous cauſes, not only by the narrative, but by conveying the ſubjects *de præſenti*, and bearing abſolute warrandice; and conſequently was a valid alteration of the ſubſtitution as to the laſt fourth of the debt.

2*do*, The confirmation of *Mary Paterſon*, as executrix *qua neareſt of kin*, did not imply any repudiation of the general diſpoſition, as a proteſt to the contrary was therein contained. The title of executrix was taken out to the wife alone, as neareſt of kin; becauſe, according to the courſe of deciſions at that time, (though ſince altered), the neareſt in kin was in competition preferred to the office before a general diſponee; and the deeds the huſband afterwards executed, ſhewed his apprehenſion of the ſubſiſtence of his right as fiar, notwithſtanding that confirmation.

Replied for *Boſwal*, The general diſpoſition having been granted *inter conjunctos*, its narrative does not prove the oneroſity; and being a total conveyance of all the granter's effects, upon which nothing followed till her death, at the diſtance of ſix years, there can be no doubt of its having been *gratuitous*; and conſequently not ſufficient in law to avoid the ſecluſion of aſſignees in the original right.

The Lords found, "That the backbond by Sir *Hugh Paterſon*, bearing an excluſion of aſſignees, the right thereof was legally veſted in the perſon of the two ſiſters, and could not be aſſigned *gratuitouſly* to the prejudice of *Mary Paterſon* the ſurviving ſiſter; and that the ſame right was carried to and properly completed in the perſon of the ſaid *Mary Paterſon*, by the confirmation in her favour; and that therefore the obligation to *Hugh Paterſon*, founded on by *Margaret Arnot*, could not be available to her in the preſent queſtion." D. R.

For *Boſwal*, *Rae*. Alt. *Maclaurin*.

N° CLXIII.

N° CLXIII. 8th *February* 1759.

ALEXANDER MACDONELL of *Glengary*,

AGAINST

His MAJESTY's ADVOCATE.

The ſubſiſtence of a right of wadſet found proved in favour of the crown, by producing the extract of a ſeiſin in favour of the wadſetter, who was forfeited.

THE lands of *Cullachie* and *Cullienalich* were ſurveyed by order of the barons of exchequer, as forfeited by the attainder of *Lochgary*, who was at the time of the forfeiture in poſſeſſion of them. *Glengary* claimed the property, as ſuperior and reverſer of theſe lands. The crown *objected*, That the claimant had no right to the property, but only to the reverſion of the lands, as they were wadſet in the 1738 by *Glengary* to *Lochgary* for 8000 merks; and in evidence of it, produced an extract of a ſeiſin, by which it appeared, that *Lochgary* was infeft on this wadſet-right in the 1741, and that the wadſet-money was paid. Certain interrogatories being put to *Glengary*, he acknowledged, that *the lands had been wadſet to* Lochgary; *but added, that only* 2000 *merks of the wadſet-money having been paid, there had been an account fitted, in the year* 1744, *betwixt Glengary and Lochgary, at which clearance the wadſet-right was delivered up, and the ſubſcriptions torn from it, ſince which time Lochgary poſſeſſed the lands as tackſman, not as wadſetter.*

Pleaded for the claimant, Except by his acknowledgment, there is not any evidence that the wadſet-right did ever exiſt. The extract of the ſeiſin was no evidence of it; and the principal ſeiſin, although it had been produced, was only the aſſertion of the notary, that ſuch an inſtrument had been taken, not that the warrant of it, the right of wadſet, did exiſt; and ſuppoſe the wadſet-right to have exiſted, many clauſes in it, favourable to the reverſer, may have been omitted in the precept and inſtrument of ſeiſin.

2*do*, The evidence ariſing from the claimant's acknowledgment, cannot hurt the claimant's plea. As one part of it cannot be ſeparated from the other, the whole of it muſt be received in evidence, or the whole rejected. By one part of it he acknowledges, that this wadſet-right did exiſt; and, by the other, that it was extinguiſhed by delivering up and cancelling the deed. The laſt part is an intrinſic quality, and the firſt part cannot be received without it.

Redemption and redelivery of the wadſet-right operates *ipſo facto* an extinction of it, in the ſame manner as intromiſſion with the rents of lands adjudged, to the extent of the ſums adjudged for, operates an extinction of the adjudication; ſo that a reſignation *ad remanentiam*, or a renunciation and diſcharge of the wadſet, are not requiſite to reinveſt the reverſer, (who, beſides having the right of reverſion prior to the wadſet, is ſtill veſted in the ſupereminent right to theſe lands, the

the ſuperiority), particularly in a queſtion with the wadſetter, and his univerſal ſucceſſor, the crown.

3*tio*, A proving of the tenor of the wadſet-right is neceſſary to make it effectual; which cannot be obtained in this caſe, as the *caſus amiſſionis* is not condeſcended on or proved, which muſt be done in every caſe where the deed is extinguiſhable, by being reſtored to the obligant.

Pleaded for the crown, The evidence ariſing from the extract of the ſeiſin, is ſufficient to prove, that the wadſet-right did exiſt in the terms above mentioned. The like evidence of a wadſet-right the court lately ſuſtained in favour of a claimant on the eſtate of *Lovat*, *Mactaviſh* of *North Migovy*.

2*do*, Was any more evidence of the exiſtence of the wadſet neceſſary, the acknowledgment of the claimant put it beyond doubt. The quality added can have no effect, as there was no reference to his oath, or acknowledgment. The queries were put in terms of the veſting-act, by which claimants are obliged to anſwer, upon oath or otherwiſe, ſuch interrogatories as are put to them by the court, or the counſel for his Majeſty. Every article of their anſwers, even though upon oath, may be redargued by contrary evidence; the crown therefore cannot be forecloſed by ſuch oaths or acknowledgments, whether they contain intrinſic qualities or not. But the quality adjected to this acknowledgment is extrinſic, as the method of extinction of the wadſet condeſcended upon is not a habile one. By the infeftment taken on the wadſet-right, it is made real; and the lands affected by it cannot be diſincumbered of it, except by a regiſtered renunciation and diſcharge, or by a reſignation *ad remanentiam*. It cannot be done, as in perſonal rights, by cancelling or retiring the contract of wadſet. The right of ſuperiority and reverſion remaining with the reverſer, is ſeparated entirely from the right of the wadſetter; and they cannot be conſolidated, but *habili modo*.

3*tio*, If the court is convinced, by the evidence produced, that ſuch a wadſet-right did exiſt, it may hold the tenor of the wadſet as proved, without putting the parties to the trouble and expence of a proving of the tenor. This was the practice of the court of inquiry in the 1716, and of this court, in the caſe of *Mactaviſh* above mentioned. The *caſus amiſſionis* need not be condeſcended on, and proved, in this caſe; as the deed amiſſing is not of a nature to be extinguiſhed by cancelling or retiring.

" The Lords adhered to Lord *Bankton*'s interlocutor, finding it pre-
" ſumed, that the wadſet-right in favour of *Donald Macdonell*, the
" attainted perſon, did ſubſiſt at the time of the attainder; and
" therefore diſmiſſing the claim to the property." J. C.

Act. *Dav. Græme.* Alt. The King's Counſel.

N° CLXIV.

N° CLXIV. 8th *February* 1759.

Mr JAMES COCHRAN, Advocate, and others,

AGAINST

Mr ADAM FAIRHOLM of *Greenhill.*

A perſonal ſervitude ſpatiandi, *not ſuſtained.*

THE *Bruntsfield* links, an open piece of paſture ground belonging to the city of *Edinburgh*, had been uſed by the inhabitants, for time immemorial, as a field of recreation, where they uſed to amuſe themſelves by playing at golf, and in walking. A little bit of the moſt rugged and uſeleſs part of this field was feued out to Mr *Fairholm*. He began to incloſe it; but was ſtopped by a complaint exhibited to the ſheriff by Mr *Cochran* and others, proprietors of houſes and yards conterminous to the links, ſetting forth, That they, their predeceſſors and authors, had acquired a ſervitude *ſpatiandi*, of amuſing themſelves in this field: That every part of it was ſubject to this ſervitude; and that Mr *Fairholm* was about to incloſe part of this field, and deprive them of their ſervitude over that part. Such perſonal ſervitudes were admitted in the law of *England*; ſee *Jacob*'s Law-Dictionary, *voce Preſcription*, where the ſervitude of dancing, for recreation, upon another perſon's ground, is mentioned as ſuſtained. And arguments were uſed from expediency, and the reaſonableneſs of it.

Pleaded for *Fairholm*, Perſonal ſervitudes are not received into the law of *Scotland*; there muſt always be a dominant tenement where there is a ſervient; *Stair*, *lib.* 2. *tit.* 7.; *Macdoual*, *l.* 2. *t.* 7. § 36.; and in the caſe of the town of *Dunſe*, 22d *November* 1732, it was found, that the town could not acquire a rural ſervitude, as it had neither property in lands nor houſes.

Mr *Cochran*, finding that the ſheriff was diſpoſed to determine againſt him, advocated the cauſe to the court of ſeſſion.

" The Lords refuſed the bill." J. C.

Act. *Maclaurin.* Alt. *Lockhart.* Reporter, Lord *Auchinleck.*

N° CLXV. 9th *February* 1759.

ALEXANDER DUNBAR of *Boath*,

AGAINST

Sir HARRY INNES.

Teſting clauſe in a mutual contract.— Implement of a contract preſumed after a long interval.

Dunbar's predeceſſor being creditor to the predeceſſor of Sir *Harry Innes* in *L.* 1103, 13 *s. Scots*, the debtor, in 1682, became bound, in payment of this debt, to deliver 200 bolls of bear of that crop before the laſt of *March* 1683, under the penalty of *L.* 8 *Scots* for every boll undelivered. This obligation was executed in the form of a mutual contract; and the teſting clauſe is in theſe terms. "In witneſs "whereof, theſe are written by *John Brodie*, ſervitor to the Laird of "*Brodie*, and ſubſcribed with *my* hand, at *Edinburgh*, the 18th of *No*-"*vember* 1682, before theſe witneſſes," *&c.* This deed is ſigned by both parties.

On this obligation *Dunbar* of *Boath* purſued Sir *Harry Innes* for payment of the *L.* 1103, 13 *s. Scots*.

Objected by the defender, The teſting clauſe does apply particularly to neither of the parties ſubſcription; therefore the obligation is improbative, void, and null: and ſuppoſing it might be applied to the ſubſcription of one of the parties, if it cannot apply to the other party's ſubſcription, it can have no effect; for, as the deed is a mutual contract, if both parties are not bound, neither are bound.

Anſwered, It was uſual, in mutual contracts, to execute two deeds of the ſame tenor, each whereof was completed by the ſubſcription of one of the parties. The deed produced was the one completed by the ſubſcription of *Innes*, and was properly found in the cuſtody of *Dunbar* the creditor. 2*do*, The teſting clauſe does apply to each of the parties ſubſcriptions taken ſeparately.

The Lord Ordinary repelled the objection.

Pleaded, That the obligation was preſcribed; and that, from the nature of the obligation, it being for the delivery of a quantity of victual within a certain time, under a high penalty of *L.* 8 for every boll undelivered, the preſumption was, that it was performed within the time, as it did not appear, that any demand was made on this obligation, either for the victual or the penalty, for thirty-nine years after both the parties contractors were dead.

The Lord Ordinary, on account of an obligation granted to *Dunbar*'s ſucceſſor in the 1722, paſſing from the defence of preſcription, but reſerving the defence of payment, repelled that plea likewiſe; but found it preſumed, that the victual was paid in terms of the obligation.

"On adviſing a reclaiming petition and anſwers, the Lords found "it preſumed, That the obligation in the contract in the year "1682, was implemented; and therefore they adhered to the "Lord Ordinary's interlocutor." J. C.

Act. *Hamilton-Gordon.* Alt. *Lockhart.*

N° CLXVI.

N° CLXVI. 9th *February* 1759.

ANDREW STALKER, merchant in *Glaſgow*,

AGAINST

ANDREW AITON merchant there.

Arreſtment in the hands of a perſon to whom goods are conſigned being uſed before the goods came to his poſſeſſion, not good.— Goods put into the hands of a truſtee, to be ſold and applied to creditors; being ſold, arreſtment in the truſtee's hands not good.

IN *February* 1754, *John Trotter* having carried to *Jamaica* a cargo of goods, inſured them in *Stalker*'s office. The price of inſurance amounted to *L.* 57, 12 *s. Sterling*, for which he granted bills on *London*. The bills were proteſted for not acceptance.

In *July* thereafter, *Trotter* ſent a cargo of ſugars from *Jamaica* to *Leith*, conſigned to *Aiton* at *Glaſgow*, and to *Mitchell* at *Leith*. He incloſed the invoices and bills of loading in a letter to *Aiton*; and deſired him, " when he received the proceeds of the cargo, to diſcharge certain " bills and accounts due by him in *Scotland*, as far as the proceeds " would go." And to the letter he ſubjoined a liſt of the creditors to whom theſe bills and accounts were due, in which Mr *Stalker* is ſet down as one. Mr *Aiton* was likewiſe deſired to inſure the cargo; which he did in his own name.

Before the arrival of the ſugars, Mr *Stalker*, in *October* 1754, arreſted them in the hands of *Aiton*, as the effects of *Trotter*, his debtor.

After the arrival of the ſugars at *Leith*, Mr *Aiton*, in *February* 1755, made out an account of the proceeds of the cargo, and allotted to each of the creditors a certain ſhare thereof, correſponding to their debts; by which the whole was exhauſted, and there remained due to the creditors conſiderable ſums.

All the creditors agreed to accept of this dividend, except *Stalker*; and *Aiton* granted an obligation to the other creditors to pay them their ſhares of it.

Before *Aiton* had paid the other creditors, *Stalker* executed another arreſtment in his hands; and on both arreſtments raiſed a proceſs of forthcoming.

Pleaded for *Aiton*, the arreſtee, That the firſt arreſtment was inept and ineffectual, as it was laid on in his hands before he was in poſſeſſion of any of the common debtor's effects.

That the ſecond arreſtment was likewiſe ineffectual, as it was not executed till after Mr *Aiton* became bound to pay the dividends agreed upon to the other creditors out of the proceeds of the cargo. They had thereby acquired ſuch a right to the proceeds of this cargo, that it could not be affected by *Stalker*'s after arreſtment.

Pleaded for *Stalker*, the arreſter, That, at the date of the firſt arreſtment, the arreſtee, Mr *Aiton*, was in the legal and civil poſſeſſion of

the

the cargo. It was conſigned to him; he had inſured it in his own name; he could have ſold it before it arrived, and veſted the property of the goods, or of the ſum inſured, in the purchaſer, although he had not then obtained the natural poſſeſſion of them: theſe effects therefore being in his poſſeſſion, were ſubjected to diligence by arreſtment in his hands, and were properly arreſted. Thus it was decided, 16th *November* 1742, in the caſe *Rae contra Neilſon*, that an arreſtment laid on in the hands of one copartner, by the creditor of another copartner, was effectual to attach the copartnery-goods, although the arreſtee was not in the natural poſſeſſion of them. And in the caſe, 13th *February* 1740, Sir *Harry Innes contra* the creditors of *Ludovick Gordon*, the Lords preferred an arreſtment laid on in the hands of an indorſee to a bill in truſt for the common debtor, to a poſterior one laid on in the ſame hands after the bill was paid, and the money thereby in the indorſee's poſſeſſion.

2*dly*, That the arreſter's becoming bound to pay the dividends to the creditors, did not transfer the property of the ſubjects; they continued *in bonis* of the common debtor *Trotter*, ſubject to be attached by legal diligence. By the commiſſion and conſignment, *Aiton* was deſired to pay the proceeds of the cargo to the creditors, only ſo ſoon as they were put into his hands. He was not deſired, by anticipation, to interpone his own obligation; by ſo doing he acted beyond his commiſſion; and ſuch actings cannot have any effect; they cannot obſtruct or defeat the operation of the ſecond arreſtment laid on in the arreſtee's hands, while he was in the natural poſſeſſion of the common debtor's effects, the price of the cargo.

Anſwered, That the firſt deciſion did not apply to the preſent caſe. Every copartner is conſidered as proprietor, and in poſſeſſion of the whole company-goods, where-ever they are ſituated; arreſtment therefore is properly executed againſt any of the partners, and will affect the goods of the copartnery; but goods conſigned to a truſtee or factor, as in the preſent caſe, are not conſidered to be in his hands until he is in the natural poſſeſſion of them, and till then they are not arreſtable in his hands.

Neither does the ſecond deciſion apply to the preſent caſe. For though bills or goods conſigned for the behoof of the common debtor may be ſubjected to the arreſtment of his creditors; yet when they are conſigned for payment of certain creditors, the property is ſo much transferred to thoſe creditors, that the goods are not liable to diligence by arreſtment at the inſtance of other creditors. This was ſo determined in a caſe, *December* 1726, *Jamieſon contra Leckie*.

" The Lord *Kames* Ordinary found, That, in *October* 1754, the " date of the purſuer's firſt arreſtment, *Andrew Aiton* had no ſuch " poſſeſſion of the goods as to make the arreſtment in his hands a " habile diligence for affecting the ſame: And with reſpect to the " ſecond arreſtment, laid on in Mr *Aiton*'s hands after he became " bound to the creditors to divide the proceeds of the cargo a- " mongſt them, found, That Mr *Aiton* was not interpelled by the " ſaid arreſtment, from making payment to the creditors in pur- " ſuance of his obligation. And the Lords, on adviſing a reclaim- " ing petition and anſwers, adhered to the interlocutor of the " Lord Ordinary."

See

See the Deciſion 23d *January* 1756, *Souper contra* the creditors of *Smith*.

N. B. Other queſtions occurred in this caſe: 1*mo*, Whether the bills were duly negotiated by *Stalker*, as they were not proteſted for not payment, though they had been proteſted for non-acceptance?

2*do*, Whether *Aiton* had retention of certain ſums due to himſelf, although he was not inſerted in the liſt of creditors? Theſe were remitted to the Ordinary, and the court gave judgment merely on the invalidity of the arreſtments. J. C.

For the arreſter, *Miller*. For the arreſtee, *John Craigie*.

N° CLXVII. 9th *February* 1759.

KATHARINE YOUNG, executrix to *Iſabel Young*,

AGAINST

GAVIN THOMSON accountant in exciſe.

Obligation taken by one who procured an office for another, to pay an annuity to the officer's aunt, ſuſtained.

Duncan Campbell, captain of the city-guard at *Edinburgh*, granted an obligation to Mr *Kerr*, member of parliament for this city, to pay, while he enjoyed his office of captain of the guard, and of keeper of the wardrobe in *Holyroodhouſe*, to *Gavin Thomſon* permit-clerk of exciſe, *L.* 19, 10 *s.* yearly, or ſuch leſſer ſum as, when added to his ſalary in the exciſe, amounted to *L.* 50 yearly; and *Gavin Thomſon* became bound to the ſame Mr *Kerr*, to pay yearly to *Iſabel Young*, his aunt, who was likewiſe aunt-in-law to Mr *Kerr*, or to any perſon he ſhould name, *L.* 10 *Sterling*, while his income amounted to *L.* 50, as above, or exceeded it, by his being preferred in the exciſe.

Campbell raiſed a reduction of the firſt obligation againſt *Thomſon*, and *Iſabel Young* charged *Thomſon* for payment of the *L.* 10 yearly on the ſecond.

Campbell's obligation was reduced, as being *contra bonos mores:* and *Thomſon* having ſuſpended *Young*'s charge, *pleaded*, That his obligation was a part of the tranſaction with *Campbell*, and was equally *contra bonos mores*, therefore null.

Both obligations were bribes, which Mr *Kerr* took from *Campbell* and *Thomſon*, for his intereſt uſed in procuring them offices, or keeping them in office, and which it was optional to him to beſtow on *Iſabel Young*, or any perſon he ſhould name.

The ruinous tendency of the ſale of offices to the ſtate, renders it unlawful; and ſuch tranſactions are prohibited, and ſubjected to penalties, by the law of *England*, 12th *Richard* II. *c.* 2.; and 6th *Edward* VI. *c.* 16.

Pleaded for *Young*, There is no ſtatute in *Scotland* prohibiting the

ſale of offices; on the contrary, offices in the army, and many civil offices, are ſold publicly, and ſome have been adjudged ſaleable by this court. Neither is it clear, that ſuch ſales have a bad tendency.

But this tranſaction is not a ſale of an office: for Mr *Kerr* had it not in his power, either to confer an office in the exciſe on *Thomſon*, or deprive him of one. He ſtipulated nothing for himſelf; he only burdened *Thomſon*, whom he had favoured by uſing his intereſt, with *L.* 10 yearly, for the maintenance of his own aunt, to do which he was bound by a natural obligation. It was a moſt pious tranſaction on the part of Mr *Kerr*; and ſo far from being *contra bonos mores*, that it is confirmed by the practice of the courts of *England*, in caſes not ſo urgent as the preſent; *Hill.* 1693, *Symonds verſus Gibſon*, 2d *Vern.* 308.; *Laurence verſus Braiſer*, 1*ſt Chan. caſe* 72. *noy.* 142.

"The Lords found *Thomſon* liable for the *L.* 10.' J. C.

Act. *And. Pringle.* Alt. *J. Dalrymple.* Clerk, *Pringle.*

N° CLXVIII. 10th *February* 1759.

JANET MACCULLOCH,

AGAINST

EDWARD MACCULLOCH of *Auchenguill.*

Cohabitation in a foreign country, if it will conſtitute a marriage in Scotland?

Janet Macculloch commenced a proceſs of declarator of marriage, before the commiſſaries of *Edinburgh*, againſt *Edward Macculloch*; in which a proof was allowed. The general import of the evidence was, That ſhe was a perſon of good character, and nearly related to the defender himſelf: That in the year 1749, and beginning of the year 1750, ſhe reſided in the family of Lady *Ardwall*, the defender's ſiſter, as an aſſiſtant in the education of her daughters: That the defender reſided in the ſame houſe, and was younger than her by ſome years: That it was diſcovered in the family, that the purſuer had, upon ſeveral occaſions, in the night-time, gone from her own apartment, where ſhe ſlept with the children, to the apartment where the defender ſlept: That, in ſummer 1750, ſhe diſcovered herſelf to be with child, and went from the houſe of *Ardwall* to her mother's houſe; where, after ſtaying a ſhort time, ſhe accompanied the defender to the *Iſle of Man*, and there reſided for about ſix months, and was delivered of a child: That the defender was very attentive to her at this time, and was underſtood by the people of the houſe to be her huſband; and that upon ſeveral occaſions, in converſing with the people of the houſe, he called her his wife, and was underſtood by his own brother to be married to her, who came to the *Iſle of Man* to make inquiry: That he procured the child to be baptized by the pariſh-miniſter, and its name was entered in the regiſter as a lawful child: That during this period, the defender went ſeveral times from the *Iſle of Man* to *Scotland* about his private

vate affairs, and returned again; upon the whole, had reſided with her in the *Iſle of Man* above three months: That upon their return from the *Iſle of Man*, the purſuer returned to her mother's houſe, and the defender to the houſe of *Ardwall:* That during the ſpace of a year thereafter, he made four viſits to the purſuer, and upon ſome of theſe occaſions ſlept with her, with the knowledge of her ſiſters, who were perſons of good character: That there was a report in the country, after his return, that he was married, and he never expreſsly contradicted that report during the firſt year after their return.

The commiſſaries "found the facts, circumſtances, and qualifications "proved, not relevant to infer marriage; and therefore aſſoilzied the "defender."

In a bill of advocation for the purſuer it was *contended*, That the judgment of the commiſſaries in this caſe proceeded from an opinion, that no cohabitation as huſband and wife, however ſtrongly ſupported by the acknowledgment of the parties that they were married, was ſufficient to conſtitute a marriage by the law of *Scotland*, if that cohabitation happened in a foreign country, by the laws of which, cohabitation alone was not ſufficient to conſtitute a marriage: That this point of law had, however, been over-ruled in a late noted caſe between *George Forbes* and the Counteſs of *Strathmore*; where the marriage was chiefly ſupported by the proof of a cohabitation and acknowledgment during the reſidence of the parties in *Holland*.

That by the law of *Scotland*, the ſerious and deliberate acknowledgment, that a child is lawfully begotten, and the mother a lawful wife, is a ſufficient proof of a private marriage between the parties, whether that acknowledgment be emitted in this country, or any where elſe. And this is not peculiar to the proof concerning a private marriage; for the evidence, that any other private deed or tranſaction had happened in *Scotland*, may ariſe, in a great meaſure, or altogether, from facts and circumſtances occurring in a different country. If it ſhould be proved againſt a perſon accuſed of any crime, that in a foreign country, before witneſſes, he fully confeſſed the matter laid to his charge, or committed, in this country, this would be good evidence of the fact, without inquiring what would be the conſequence of ſuch confeſſion by the laws of the country where it was made.

That in this caſe, from the character and rank of the purſuer, there was the ſtrongeſt reaſon to preſume, that there had been a promiſe of marriage, and that ſhe had truſted to the faith and honour of the defender: That this was further confirmed by his open acknowledgment of her as his wife in the *Iſle of Man*, and his ſolemn and deliberate acknowledgment that the child was lawfully begotten, at the ſacrament of baptiſm: And though he made uſe of ſeveral pretences to delay avowing the marriage in *Scotland*, yet his viſits to the defender at her mother's houſe, were evidently upon the footing of an acknowledged huſband; and his never contradicting the report which prevailed after their return from the *Iſle of Man*, even to his own particular relations, muſt be held as the ſtrongeſt acknowledgment of the fact.

Anſwered, Cohabitation as man and wife does, by the law of *Scotland*, eſtabliſh a marriage; but ſuch cohabitation requires the open and repeated acknowledgment of the parties, and muſt appear to be the reſult

ſult of a deliberate intention to avow each other as man and wife. The writers on the Civil law require, that it ſhould ſubſiſt for ten years: and *Craig*, as well as Lord *Stair*, require, that it ſhould ſubſiſt a *conſiderable* time; but none of theſe requiſites occur in the preſent caſe.

It appears by Sir *George Mackenzie*'s Obſervations upon the act 77. parl. 1503, that the proof ariſing from cohabitation is capable of being redargued by a contrary proof; and here there is not only no proof of an actual marriage, but the ſtrongeſt preſumptions of the contrary.

It is an eſſential requiſite of cohabitation, that it ſhould be open and public. This appears from the Civil Law, *l.* 9. *et* 22. *Cod. De nuptiis.* But here the cohabitation was clandeſtine, and concealed, in a ſolitary place; and occaſioned merely by the neceſſity of aſſuming that appearance, that the purſuer might be treated in a proper manner during her delivery and inlying.

The cohabitation in the *Iſle of Man* cannot eſtabliſh the marriage, for another reaſon: The legal import and effect of a man's actions muſt be judged of according to the law of the country where he is reſiding at the time. Thus intromiſſion by a *Scotſman* with goods in *England* belonging to a *Scotſman* who died in *Scotland*, without confirmation here, was found no paſſive title; but only to ſubject the intromitter *in valorem*, agreeable to the law of *England*, where the intromiſſion happened; *March* 1683, Archbiſhop of *Glaſgow contra Bruntsfield.* If a different law were to prevail with reſpect to marriage, this abſurdity would follow, that parties might be held as married in one part of the united kingdom, and not in the other.

In the caſe of *Forbes contra* the Counteſs of *Strathmore*, the cohabitation in *Holland* was not held ſufficient to eſtabliſh the marriage: for not only was the acknowledgment of the parties in that caſe much ſtronger and more explicit than in this, and their cohabitation of a longer continuance; but there was alſo ſtrong preſumptive evidence, that an actual marriage had been celebrated in *Scotland.*

There is here no proof of an actual marriage, but ſtrong preſumptions to the contrary. There is no proof of any acknowledgment or cohabitation, except what happened in the *Iſle of Man*; and the whole of the defender's behaviour, both before he went to that iſland, and after his return, was contradictory to the ſuppoſition of a real or an acknowledged marriage. It was not neceſſary for him to contradict every idle report, or to ſet every one right who had conceived a falſe opinion.

" The Lords remitted the cauſe to the commiſſaries, with inſtruc-
" tions to find the marriage proved." W. J.

Act. *Garden, Lockhart.* Alt. *Alex. Murray, Hamilton-Gordon, Miller.*

This judgment was reverſed by the Houſe of Peers, and the marriage found not proved.

N° CLXIX.

N° CLXIX. 13th *February* 1759.

ALEXANDER ORME writer to the signet,

AGAINST

NEIL MACVICAR.

Summons of forthcoming raised and signeted before executing the arrestment upon which it was to be founded, if regular?

THE affairs of *Robert Baillie* merchant in *Edinburgh*, and *Robert Fisher* of *Newhall*, who had become cautioner for him, having gone into disorder, the greatest part of their creditors consented to trust-rights granted by them to certain trustees for behoof of the whole creditors. *Neil Macvicar*, late writer in *Edinburgh*, being creditor to *Baillie* for 2000 merks, pursued a separate course of diligence, and adjudged for his own behoof. At the same time he used several arrestments against the subjects of both the common debtors, and brought forthcomings thereon. A complaint was given into the court against the said *Neil Macvicar* by the other creditors, *charging Macvicar*, and the messenger who executed one of these arrestments and forthcomings, with an irregular and illegal procedure in the execution thereof, *viz.* That the summons of forthcoming had been executed at the same time with the arrestment, on the afternoon of the 24th of *May* 1757, at nine miles distance from *Edinburgh*; so that it was not possible that a summons libelling on these arrestments could have been taken out from the signet on the 24th of *May*, (as the signet-summons bears), after the execution of the arrestments; and therefore the narrative in the execution of the summons of forthcoming was evidently false, as the warrant for the citation could not be in the messenger's hands at the time.

Answered for *Macvicar*, The summons of forthcoming was signeted upon the forenoon of the 24th of *May* 1757; and the messenger carried it from *Edinburgh*, along with the horning expede 20th *November* 1755, and had both in his custody when, upon the afternoon of the said 24th *May*, he gave the copies of citation in the forthcoming immediately after laying on the arrestment; so that the simple fact is, That a summons of forthcoming was taken out before using the arrestment.

This method, though perhaps somewhat irregular, is however justified by practice, now grown constant and inveterate. Nothing wrong was or could be meant by it in this case; and the only intention of it was, to save the expence of sending the messenger a second time to execute the summons of forthcoming; from which no harm whatever could arise to the complainers, or to any other person. This very objection was over-ruled as far back as the 7th *January* 1704, in a case marked in the *Dictionary*, *vol.* 1. *p.* 54.; from which it appears, that the like custom had even then taken place, and was authorised and approved of by the court, upon very just grounds, recited in the decision; and as no contrary decision has occurred, and the same reasons of ex-

pediency, from the ſaving of expences, and the conveniency of the ſubjects, do ſtill ſubſiſt without any damage ariſing therefrom, this complaint muſt appear to be groundleſs.

Obſerved on the bench. The procedure here was moſt incongruous, as the ſummons of forthcoming is plainly made to narrate a fact not true; and this practice ought not to be allowed, although it may ſave the expences of double execution. The ſingle deciſion above mentioned will not make law; and, in a later caſe, ſimilar to the preſent, Creditors of *Strichen*, 1706, obſerved by *Forbes*, the Lords found, That a libelled and ſigneted ſummons, before it was executed, did not make a depending action; and therefore did not ſuſtain arreſtments raiſed and executed thereon; although there was likewiſe, in that caſe, a clear proof of the conſtant practice of taking out the arreſtment at the ſame time with the ſummons which made the dependence. But as the cuſtom with regard to the preſent caſe had been inveterate, and there was no prejudice here done to any body, this was not a proper ſubject for a ſummary complaint.

"The Lords diſmiſſed the complaint, with expences." G. C.

Act. *Arch Murray.* Alt *Montgomery.*

N. B. The Lords appointed a committee of their number to draw up an act of ſederunt relating to this matter.

N° CLXX. 13th *February* 1759.

THOMAS BARLAY, and AGNES SMITH his ſpouſe, purſuers,

AGAINST

JOHN CHRISTIE, and JANET SMITH his ſpouſe, defenders.

Prorogation of the juriſdiction of a juſtice of peace.

Walter Smith, father to *Agnes* and *Janet Smiths*, left all his effects to his daughter *Janet*, excepting *L.* 100 *Scots*, which he left to *Agnes*, by a verbal legacy, a few days before his death.

Agnes brought a proceſs upon the paſſive titles againſt *Janet* and her huſband, for payment of this legacy, before the juſtices of peace for the county of *Stirling*.

Compearance was made for the defenders; and no objection being at firſt made to the juriſdiction of the court, a proof of the libel was allowed and taken; and the juſtices of peace, upon conſidering the proof, and mutual memorials thereon, found the legacy inſtructed; and ordained the defender to depone upon the paſſive titles. A reclaiming petition was preſented to the juſtices, in which the want of juriſdiction was objected, and the court declined. To this it was *anſwered*, That the juriſdiction of the court had been prorogated by repeated

peated ſteps of procedure, and could not now be declined. The juſtices repelled the objection; and decerned conform to the libel.

Againſt this judgment the defenders appealed to the quarter-ſeſſions; who found, That the juſtices of peace were not competent judges in this proceſs; and diſmiſſed the ſame.

The purſuers obtained an advocation, in which they *pleaded*, That after the clear proof of the legacy brought in this caſe, the defenders could not now be allowed to render the whole proceedings null, or to object to the juriſdiction, which they had by ſo many repeated acts acquieſced in: That the juſtices of peace have a juriſdiction in ſeveral civil caſes committed to them by law; and therefore that juriſdiction is capable of prorogation *to other civil caſes*, by the conſent of parties; and it is only where a judge has originally no juriſdiction at all, that it cannot be enlarged by the conſent of parties. Thus the juriſdiction of the commiſſary-court is limited in civil cauſes to ſums within *L.* 40 *Scots*; but, by the acquieſcence of parties, they may judge to any extent. And this is agreeable to the principles of the *Roman* law, as laid down by *Voet*, *De juriſdictione*, § 14.; and therefore the cauſe ought to be advocated; and the firſt judgment of the juſtices of peace, finding the libel proven, *&c.* ought to be affirmed.

Anſwered, That judging in caſes of this kind was contrary to the nature of the juriſdiction given to juſtices of peace, and contrary to the end of their inſtitution, which was originally intended to preſerve the peace, and regulate the police of the country, and to judge in ſome ſmall matters intruſted to their care by particular acts of parliament, ſuch as, the maintenance of the poor, wages, highways, bridges, and ferries, and ſome things relating to the cuſtoms and exciſe, all granted by expreſs ſtatutes, beyond the preciſe bounds of which their limited juriſdiction could not be extended: That prorogation of juriſdiction by tacit conſent, takes place only in two caſes, *1ſt*, When the party is, by a perſonal privilege exempted from the juriſdiction of the court, as members of the college of juſtice; or *2dly*, Where the judges juriſdiction is limited to a certain extent; as, when a party makes no objection to the juriſdiction of the commiſſaries, in a queſtion relating to a ſum larger than that to which they are limited. There the juriſdiction would be prorogated; becauſe the judge has an inherent civil juriſdiction, capable of prorogation by the conſent of parties. But where the juriſdiction is not originally founded; where it is not inherent in the judge, or nature of the office; in ſhort, where there is a total want of juriſdiction in the judge, as to caſes of a ſimilar kind, there the tacit conſent of parties cannot endow him with it; becauſe, as it is well expreſſed in the late Inſtitute of the law, that would be granting a liberty to every private perſon to confer juriſdiction; which is abſurd and impoſſible. As therefore the juſtices of peace have no radical juriſdiction in civil matters, ſuch as the preſent, the judgment of the quarter ſeſſions, diſmiſſing this cauſe, was proper; and there ought to be no advocation.

" The Lords advocated the cauſe; and remitted to the Lord Ordi-
" nary to proceed accordingly." G. C.

Act. *W. Steuart.* Alt. *J. Monro.* Reporter, Lord Juſtice-Clerk.

N° CLXXI.

N° CLXXI. 14th *February* 1759.

GEORGE HEPBURN of *Smeaton*,

AGAINST

JOSEPH BURN tenant in *Craig*.

A tack, though excluding aſſignees and ſubtenants, may yet be aſſigned by the tenant to his eldeſt ſon.

IN this caſe, a tack having been granted "to a tenant, his heirs, and "executors, ſecluding aſſignees and ſubtenants of no higher degree "than himſelf, and whom the heritor ſhould be content with, and ac- "cept of, allenarly;" and the tenant, who had fallen in arrear of rent, and become bankrupt, having executed an aſſignation of his tack, of which fifty years were to run, in favour of his eldeſt ſon, who new-ſtocked the farm, and entered into poſſeſſion thereof; and thereafter the heritor having obtained from the father a renunciation of his tack, upon which a proceſs of removing was brought againſt him before the ſheriff of the county, compearance was made for the ſon, the aſſignee. The ſheriff found, "That the aſſignation being cloathed with poſſeſſion "long prior to the date of the renunciation, was preferable thereto; "and therefore diſmiſſed the removing."

A bill of advocation was offered againſt this judgment, and reported to the court.

Pleaded for the heritor, A tack, excluding all aſſignees without diſtinction, cannot be effectually aſſigned to the tackſman's eldeſt ſon. Tacks are underſtood to be *ſtrictiſſimi juris*. The convention of parties here expreſsly excludes all aſſignations; and it may be of bad conſequence to proprietors in general, if aſſignations ſuch as the preſent, ſhould be ſuſtained. At this rate, when a tenant becomes bankrupt, he may elude the maſter's juſt right and privilege of removing him from his poſſeſſion if he cannot find caution, by a conveyance to his eldeſt ſon, though an infant; and then, as adminiſtrator-in-law for his ſon, he continues to have the full adminiſtration and enjoyment of the tack, as fully, in every reſpect, as if he had never been diveſted thereof.

2*do*, The aſſignation founded on, was a latent deed, without any intimation; and the pretence of poſſeſſion upon it by the ſon, was a mere ſham, while the father continued to dwell openly upon the farm: it was a fraudulent and colluſive contrivance to diſappoint the maſter, who, being ignorant thereof, gave the father an onerous conſideration for the renunciation.

Anſwered to the *Firſt*, The landlord, by granting the tack to heirs, has given them an indefeaſible right to take and hold that tack. The heir, upon his exiſtence, has a right to the tack, precluded only by the right of his father or predeceſſor; and whenever the father thinks proper to yield that preference to the heir, no perſon is injured, or intitled to complain. Whether the heir is old or young, can be of no conſequence: for by the conception of the tack, the heir is called to the

the poſſeſſion, though he was but juſt born, or was even *in utero* at the time of his father's death. The landlord has no right or privilege after he has granted a tack, but to receive or ſecure his tack-duty. The poſſeſſion of the farm is as much the right and privilege of the tenant, by virtue of his tack, as the landlord's property is by his charter. And as the ſon, in this caſe, has new-ſtocked the farm, cultivated it properly, and hitherto paid his rent punctually, the landlord has no title to aſk more, or to turn him out of a beneficial farm, of which he is lawfully in poſſeſſion.

To the *Second*, It is clear from the proof adduced, that the ſon entered to poſſeſſion of the farm many months prior to the renunciation, and has publicly poſſeſſed the ſame ever ſince, being aſſiſted with money for ſtocking, and in the management thereof, by his friends, ſolely for his own behoof. Nor is there the leaſt ground for alledging fraud againſt the ſon, in whom it was natural and proper to accept of this aſſignation of a profitable tack. And with regard to the onerous cauſe ſaid to be given to the father for granting the poſterior renunciation, there is no evidence produced of the fact: And, at any rate, a perſon once diveſted, even by a gratuitous deed, has no right to make any poſterior conveyance, either gratuitous or onerous.

" The Lords refuſed the bill of advocation." G. C.

Act. Garden. *Alt. And. Pringle.*

N° CLXXII. 16th *February* 1759.

SCOTS,

AGAINST

ELISABETH SCOT.

Whether the mother or the tutors of infant-pupils are intitled to direct their education and place of reſidence?

A Gentleman, by a deed executed ſome time before his death, nominated and appointed his relict, her father, and her two brothers, and another gentleman, to be tutors and curators to his children during their pupillarity and minority; any two of them to be a quorum.

The children ſurviving the father, *viz.* two ſons and three daughters, were very young when he died, and remained with their mother in the country for ſome time. When the eldeſt boy was ſix years old, and the ſecond five, the grandfather and one of his ſons, two of the tutors, gave directions for taking away the two boys from the mother, and bringing them to *Edinburgh*, to be there boarded, and put to ſchool for their education. The mother refuſed to comply with this meaſure, and inſiſted, That ſhe was the proper cuſtodier of her infant-children; eſpecially as ſhe was named one of the tutors to them: That as the children were too young, and their conſtitutions very weakly, *Edinburgh* was not a proper place for their education, and their health would be endangered by their cloſe reſidence there; or, at any rate, that it would be more proper to put them to ſchool at a town healthfully

ſituated, in the near neighbourhood of her reſidence in the country, where they might be properly boarded with a maſter of very good character, and at the ſame time be under her inſpection.

The mother having, for theſe reaſons, refuſed to give up the children, the two tutors applied by petition to the court, for a warrant to obtain the cuſtody of the boys. Anſwers were given in on the part of the mother, ſetting forth the above-mentioned reaſons for oppoſing the deſire of the petition; and alſo *objecting*, 1*mo*, That it was not competent to any two of five tutors, four of whom had accepted, to inſiſt in a ſummary application of this kind: That it was neceſſary that a proper action ſhould be brought before the court, in which the whole tutors ſhould be called, and their opinions heard and conſidered; and that there was no reaſon in this caſe, why the ordinary rules of proceeding ought to be diſpenſed with. 2*do*, If this application were competent at the petitioners inſtance, ſtill the mother is by law intitled to the cuſtody of her children till they arrive at a greater age than either of them has attained to. *Balfour* obſerves ſeveral caſes where this point was determined, in the title *Of keeping minors perſons*, *cap.* 24. *p.* 336. "The care and keeping of an heir, being minor, and "of all other minors, pertains to the mother, after the deceaſe of their "father; and the mother, in this caſe, ought and ſhould be preferred "to the minors goodſire, and to all the reſt of his friends and kinſ-"men." This rule, eſtabliſhed above two hundred years ago, has not been altered againſt the mother in any caſe where ſhe continued unmarried; and far leſs ought it to be ſo, where ſhe has been intruſted by her huſband with the care of her children, as one of their tutors; and as the maternal care is dictated by nature, and is far preferable to all others on many accounts, ſhe ought therefore to be preferred to the cuſtody of theſe pupils in their preſent infant ſtate.

Obſerved on the bench, None of the other tutors named are here joining with the mother; therefore the petitioners are a quorum, and intitled to make the application. It was anciently, indeed, our law, that the mother ſhould have the cuſtody of pupils; but that will not now take place univerſally. The rule admits of many exceptions. But the queſtion here is not ſo much, Who ſhall have the cuſtody of the children? as, Who ſhall have the direction of the place of their education? of which the petitioners are more proper judges than the mother.

"The Lords found the petitioners intitled to the cuſtody of the chil-"dren." G. C.

Act. *J. Craigie.* Alt. *Ferguſon.*

N° CLXXIII.

N° CLXXIII. 16th *February* 1759.

PATRICK NISBET merchant in *Glaſgow*, purſuer,

AGAINST

WALTER STIRLING merchant there, defender.

Adjudication in ſecurity of a debt in diem *refuſed, in reſpect no proof was offered that the debtor was* vergens ad inopiam.

IN 1754, *William Stirling* ſurgeon in *Glaſgow* executed a bond of proviſion in favour of his daughter *Janet*, ſpouſe to *Patrick Nisbet* merchant there; whereby he became bound to pay *L.* 250 *Sterling* to her, over and above the tocher formerly contracted with her, and that at the firſt term of *Whitſunday* or *Martinmas* after the deceaſe of his wife *Eliſabeth Murdoch*, mother of the ſaid *Janet Stirling*; and to pay *L.* 600 *Sterling* to their other daughter *Eliſabeth*.

Of the ſame date *William Stirling* executed two diſpoſitions in favour of *Walter Stirling*, the defender, his only ſon; the one of his land-eſtate, and the other of his debts, goods, and effects. Theſe diſpoſitions contained this clauſe: " That the ſaid *Walter*, and the ſubjects hereby " conveyed to him, ſhall be affected and burdened with the annuities, " burdens, and proviſions, made and granted, or to be made, grant- " ed, and conceived, by me, in favour of *Eliſabeth Murdoch* my ſpouſe, " and the children procreate betwixt her and me."

Upon the death of *William Stirling*, his ſon *Walter* ſucceeded to his whole eſtate, heritable and moveable, with the burden of his mother's jointure, and the above proviſions to his two ſiſters.

Patrick Nisbet having got right from his wife to the ſaid additional proviſion, inſiſted, as *Walter* was a young man of little experience, and had lanched out into an extenſive trade, the conſequences of which were precarious, he ſhould find ſecurity for payment of the *L.* 250, when, upon the mother's death, it ſhould fall due.

The parties having diſagreed about the terms of this ſecurity, *Patrick Nisbet* brought a proceſs of conſtitution againſt *Walter* before the magiſtrates of *Glaſgow*, concluding, That he ſhould be perſonally decreed to make payment of the debt againſt the term of payment; upon which he obtained decreet. During the dependence, he alſo raiſed inhibition and arreſtment againſt *Walter*; who thereupon preſented a petition to the court, complaining of theſe diligences, as oppreſſive, and hurtful to his credit. The purſuer agreed to paſs from his arreſtments; but the court likewiſe recalled the inhibition.

The purſuer next brought a proceſs of adjudication in ſecurity, founded upon his decreet of conſtitution, only ſuperſeding execution till the term of payment ſhould arrive. The defender appeared, and *alledged*, That all this was done *in æmulationem*; and that an adjudication in ſecurity, before the term of payment of the

the debt, could only be granted when the debtor was *vergens ad inopiam.*

The Lord Ordinary pronounced the following interlocutor. " In reſpect " that an adjudication in ſecurity, before the term of payment of the " ſum adjudged for, is an extraordinary remedy, not allowed except " when the creditor is in danger otherwiſe of loſing his debt, and " there is no ſufficient ground of ſuch hazard alledged; and that " the Lords, upon the like grounds, recalled an inhibition uſed for the " debt now intended to be adjudged for; ſuſtains the defence; and " aſſoilzies."

Pleaded, in a reclaiming petition, for the purſuer, By the law of *Scotland* a creditor in a juſt and liquid debt, *cujus dies cedit, licet nondum venerit*, is intitled to the diligence of the law, for the ſecurity of his debt. He ought not indeed to be allowed to proceed to execution till the term of payment is come: but there can be no reaſon to hinder him from ſecuring his payment againſt that term. A debt due *in diem*, is as onerous a debt, and equally intitled to ſecurity, as any other debt can be. A creditor in a debt already due, has many ways of recovering payment by immediate execution; whereas a creditor *in diem* has his hands tied up from execution; and if he is not intitled to do diligence for ſecurity, he muſt often loſe his debt, though his all were at ſtake, and although he plainly foreſaw the approaching bankruptcy of his debtor. The adjudication which the purſuer demands, is no ſtep of execution. It is only a means of ſecuring the debt when it ſhall become due, and, till that period, can have no conſequences hurtful to the debtor, however uſeful they may be to the creditor. And ſuch diligence has been frequently admitted by the court; *Watkins contra Wilkie*, 2d *January* 1728, obſerved by Mr *Home*; Sir *John Meres contra York-building* company, 27th *February* 1728; and in the caſe of *Eaſter Ogle*, *January* 24. 1724, it was found, " That an adjudication in ſecurity for " a daughter's bond of proviſion might proceed, and compete with the " other creditors, though the term of payment was not till her age " of eighteen years poſterior to the competition."

This diligence for ſecurity is a juſt and legal remedy, competent to every creditor *in diem*; not an extraordinary remedy, to be granted only when the debtor is *vergens ad inopiam.* Where malice and emulation appear clearly to be the motives of proceeding, a creditor may indeed be barred from this legal ſecurity in particular caſes; but in ordinary caſes, where nothing of that kind appears, the law muſt have its effect, and every creditor muſt be allowed to take proper care of his own intereſt. In the preſent caſe, the defender's circumſtances, as a young man, deeply engaged in trade, ſufficiently point out a reaſon for the purſuer's being anxious to have a proper ſecurity for his debt. The fortunes of all merchants are precarious; and it is a very nice and difficult matter to know when a merchant is *vergens ad inopiam*, as the greateſt bankruptcies often happen in the moſt ſudden and unexpected manner. Beſides, to be obliged, on an occaſion of this kind, to point out even juſt cauſes of ſuſpicion, would do a merchant's credit much more harm than any right in ſecurity could do. And if the defender apprehends any bad conſequences from this proceſs, he hath it in his power to prevent it, either by giving perſonal ſecurity, or by offering a progreſs of lands, equal to the debt; which laſt is the more

more reaſonable, as it is plain, from the above-recited clauſe in the diſpoſitions, that his father intended to make the proviſions of the daughters a real burden upon the land-eſtate diſponed to his ſon, although he has erred in the conception of the clauſe, by making it too general for that purpoſe.

Anſwered for the defender, The ancient diligence of appriſing in the law of *Scotland*, as well as that of adjudication, which was introduced to ſupply its place by the ſtatute 1672, are properly *executory diligences*; and proceed upon the ſuppoſition that the debt is due, and that the debtor is *in culpa*, in not performing his obligation: and from the whole ſtyle of our acts of parliament, and the words and procedure in theſe diligences, it is obvious, that they do not apply to debts that are not become due. So the court decided, 18th *July* 1699, *Chalmers contra* the creditors of *Shaw*, *Dict. vol.* 1. *p.* 540. No creditor has, *de jure*, a title to demand the legal diligence of adjudication, unleſs he can ſubſume, that his debt was due, and ought to have been paid before his demand of adjudication. At the ſame time it is true, that the court has ſometimes allowed adjudications to be led for ſecurity of debts before the term of payment. But this is not founded, either in the common law, or in any ſtatute. It is an interpoſition of the *nobile officium* of the court; and is never exerciſed, but in caſes where a creditor, without ſuch interpoſition, is in imminent hazard of loſing the ſubject to be affected by his diligence. For inſtance, when other creditors, whoſe debts are become due, are carrying on diligence by adjudication; if a creditor *in diem* is not allowed to concur with them within the year, he muſt be totally excluded; and therefore the court will allow him to lead an adjudication in ſecurity. Such was the caſe of *Eaſter Ogle*, mentioned by the purſuer; but no inſtance has occurred, where an adjudication was allowed before the term of payment of the debt, unleſs where the creditor was in apparent hazard of loſing his debt if not allowed this *extraordinary remedy:* and it is in all caſes incumbent on the creditor who applies for ſuch extraordinary interpoſition, to prove the neceſſity of it from the hazard he is in of the ſubject being evicted from him by the diligence of others. Without ſuch evidence, the court will not interpoſe, to put a weapon in his hand which the law does not give him, in order to diſtreſs a ſolvent debtor who is ready to pay his debt as ſoon as it becomes due, or can be demanded.

The purſuer's doctrine, "That ſuch diligence in ſecurity can have "no effect againſt the debtor till the debt becomes due," ſtands on an improper foundation. Though the creditor can draw nothing by his diligence until the debt becomes due; yet it muſt, in the mean time, have very diſtreſſing conſequences with reſpect to the debtor. It commences *a preſcription of year and day*, within which all his other creditors muſt carry on adjudications, whether their debts are due or not. If this was to be allowed, it would be impoſſible to carry on commerce in any ſhape. Lord *Stair*, *lib.* 1. *tit.* 17. § 15. has laid down the rule of law very differently from what is contended for by the purſuer. His words are, "Legal execution is not competent ordinarily till delay, be-"cauſe none ſhould be purſued till he have failed; yet *in ſome caſes*, "the debtor may be purſued before the term, to pay at the term, as "*ſi vergat ad inopiam.*" Here the *rule* is laid down, and the *exception*. The purſuer's plea would convert the *exception* into the *rule*; and by

that means would throw every debtor who is ready to pay his debts punctually as ſoon as they become due, into the ſame diſtreſs as if he had already failed in payment, and made execution againſt his effects neceſſary. The diligence now inſiſted on is a ſtronger ſtep than either the former arreſtment or inhibition, which the court diſmiſſed as nimious; and is evidently emulous and vexatious, as the defender's credit is undoubted, he being worth ſeveral thouſand pounds *Sterling*, and only engaged in the inland trade of manufactures, and not in any hazardous foreign trade. Neither are any of his creditors, or his other ſiſter, who has a much larger claim upon him than the purſuer, making any demand upon him, being perfectly ſatisfied with his ability to pay. And although the defender, for peace ſake, offered the purſuer ſecurity for his debt on reaſonable terms, which he rejected; yet he is under no obligation by law to convey his lands for payment of a debt that is not due.

"The Lords adhered to the Lord Ordinary's interlocutor; and found "expences due." G. C.

Act. And. Pringle. *Alt. Ferguſon.*

N° CLXXIV. 20th *February* 1759.

ROBERT STEPHEN,

AGAINST

STEWART LYELL, JOHN GARDINER, and ROBERT PEIRSON.

Simoniacal paction.

THE pariſh of *St Vigian's*, of which the crown is patron, became vacant. Two ſeveral candidates ſolicited the heritors, in order to procure, by their intereſt, a preſentation. The friends of one of the candidates offered to the heritors a year's vacant ſtipend for repairing the kirk, kirk-yard dikes, and manſe, provided they would procure the preſentation for him. *John Gardiner* and *Robert Peirſon*, who were the friends of the other candidate, were conſtrained, by ſome of the heritors, to agree to the ſame terms; and gave power to *Stewart Lyell* to enter into an agreement to that purpoſe; which he did by a letter in the following terms. "Gentlemen, In conſideration of certain favours "granted me by you, I hereby oblige myſelf to procure you a gift to "a year's vacant ſtipend of the pariſh of *St Vigian's*, on occaſion of the "preſent vacancy, or otherwiſe to pay you the ſame, or what part "thereof I do not procure you a gift to, out of my own pocket, and "that how ſoon a year's ſtipend becomes due, after the widow of the "laſt incumbent has got her *ann*, to be applied by you in repairing "the church and manſe," *&c.* Addreſſed, *To Meſſ. Stephen and Strachan, and the other heritors of the pariſh of St Vigian's.*

The preſentation was obtained, and an application was made to the preſbytery by the heritors to delay the ſettlement, that ſome vacant ſtipend

pend might ariſe. The preſbytery having heard of the tranſaction, refuſed this; but though they completed the ſettlement, they commenced a proceſs againſt the miniſter, as guilty of ſimony; in the courſe of which it appeared, that the miniſter was not privy to the tranſaction made by his friends; and therefore he was acquitted.

The reparation of the church having afterwards amounted to a conſiderable ſum, *Robert Stephen* brought an action before the ſheriff againſt *Stewart Lyell*, upon the above obligation, for payment of *L.* 38, 5 *s. Scots*, as *Stephen*'s ſhare of theſe repairs; and *Stewart Lyell*, on his part, brought an action againſt *Gardiner* and *Peirſon*, to relieve him of the conſequences of *Stephen*'s action.

The ſheriff "found *Lyell* liable for Mr *Stephen*'s ſhare of the repairs, "and for expence of proceſs; and found Meſſ. *Gardiner* and *Peirſon* "liable to relieve *Lyell*."

The cauſe was removed from the ſheriff-court by advocation. It was *argued* for *Lyell*, *Gardiner*, and *Peirſon*, That no action could lie upon this obligation, becauſe it had been granted *ob turpem cauſam*; that it had been unduly extorted from the defenders by the heritors, and in particular by Mr *Stephen* the purſuer, and Mr *Strachan*, in order to relieve themſelves, at the expence of the miniſter, of a burden to which by law they were ſubjected; and that it would be of moſt dangerous conſequence to give ſupport to ſuch tranſactions, by which the ſmall revenues of the clergy of *Scotland* might in time be reduced below what was neceſſary for their abſolute ſubſiſtence.

Anſwered, The obligation was not elicited by the purſuer: it had been inſiſted for, indeed, by Mr *Strachan*; but, ſo far as the purſuer was concerned, it had been voluntarily granted; for the purſuer had agreed to ſupport this candidate long before the date of this obligation, though he ſigned the petition in his favour only of the ſame date.—— That there was nothing improper or ſimoniacal in the tranſaction; for as, upon ſuch occaſions, ſettlements are often poſtponed on purpoſe that vacant ſtipends may ariſe, which are, for the moſt part, granted by the crown as patron, for repairing the kirk and manſe, there could be nothing wrong upon the part of the heritors, to make it a condition of their ſupporting a particular candidate, that they ſhould not be deprived, by haſtening his ſettlement, of the vacant ſtipends, of which they would otherwiſe have had the benefit.

The Lord *Shewalton* Ordinary, found, "That the obligation was "granted *ob turpem cauſam*; and that no action could lie upon it: "and in reſpect of *Lyell*'s concurrence in the unlawful paction, which "was the cauſe of granting the obligation, found no expences due to "him; but amerciated the purſuer in *L.* 10 *Sterling*, to be paid to the "poor."

"The Lords adhered; and alſo impoſed a fine upon *Gardiner* and "*Peirſon*." W. J.

Act. *W. Steuart.* Alt. *Scrymgeour.*

N° CLXXV.

N° CLXXV. 21ſt *February* 1759.

HERITORS of the pariſh of *Inverneſs*,

AGAINST

The MAGISTRATES and TOWN-COUNCIL of *Inverneſs*.

Grounds gained from the ſea by building walls, are not ſubject to pay teinds.

IN the proceſs of augmentation and locality, at the inſtance of the miniſters of *Inverneſs* againſt the heritors of that pariſh, the following queſtion occurred betwixt the magiſtrates and town-council and the other heritors. *viz.* Whether certain lands gained off the ſea by the town in the year 1746, were teindable, and ought to be aſſeſſed with payment of part of the ſtipend to the miniſters?

Pleaded for the town, This piece of ground was formerly a ſalt marſh covered by the ſea, till about the year 1746, that the town built very high dikes round it, in order to keep out the ſea, by which means it came to be ſo improved as to yield *L.* 183, 12 *s.* *Scots* of rent: That this acquiſition was made at a very great expence, in proportion to the value ot the ground; and the annual expence of ſupporting the dikes, which, from the damage occaſioned by the ſea, required conſtantly to be repaired, was alſo very conſiderable; and this improvement was in daily hazard of being totally undone by the ſea's breaking through the bank; and therefore the *L.* 183, 12 *s.* now paid to the town, could not be ſaid to be a conſtant and certain rent, which is a requiſite by law in all eſtates out of which the fifth part is to be claimed in name of tithes: That it was now a fixed point in the practice of the court, founded on the moſt reaſonable principles, that ſubjects of this ſort, which have been acquired at an unuſual expence, cannot be ſubjected to the payment of tithes; as has been decided in a variety of caſes. Thus a loch having been drained at a conſiderable expence, whereby the ground formerly covered with water, having become arable and good, in the locality of the pariſh of *Calder*, within which the ground did lie, the queſtion occurred betwixt the proprietor of the loch and the other heritors, Whether it was to be ſubjected to the payment of tithes? And the court, on the 11th *July* 1739, found, That ſuch piece of ground could not be ſubjected to the payment of tithes. The reaſons for exempting the town's new improvement, in the preſent caſe, is much ſtronger than occurred in that of the loch, as muſt be evident from the facts before ſpecified.

Anſwered for the heritors, The reaſons aſſigned are no wiſe ſufficient to juſtify the demand of an exemption. Theſe lands have yielded a conſtant fixed rent at leaſt for theſe thirteen years paſt, and may yield the ſame or a greater rent in time coming, if not ſwallowed up by the ſea: but this bare poſſibility is ſo extremely remote, and the real danger ſo very ſmall, that no regard ought to be had to it. Extraordinary calamities may happen, and grounds may be deſtroyed by earthquakes, inundations,

inundations, and overblowings of ſand; and when ſuch things occur, they may intitle the poſſeſſors of theſe lands to a total or partial abatement of the proportion of ſtipend formerly paid by them. But, in the mean time, as the town receives the benefit of the miniſtry, there is no good reaſon, why they ought not to pay for the ſupport of it, as well as the other heritors, whoſe lands are alſo liable to accidents, as all human things are. Any expences which have been laid out in gaining the ground off the ſea, have been abundantly compenſated by the profits which have thereupon ariſen: and whatever conſideration has upon ſome occaſions been had of recent expences of this ſort in valuing teinds; yet this has never been transferred to proceſſes of augmentation and locality. And the reaſon of the diſtinction is manifeſt: A titular's plea is unfavourable, more particularly when he is graſping at lands which properly had not a being when his right as titular commenced; and ſuch was the caſe as to the loch of *Calder*, which occurred in a valuation of the teinds, not in a locality of the ſtipend. But where lands have ſtood at a conſtant fixed rent for thirteen years, and that rent now as ſure and permanent as of any lands whatever, upon the ſmall expence of ſupporting the ſea-dikes, it is againſt law and reaſon, that the proprietors of ſuch lands ſhould not pay their proportion for the ſupport of the miniſters.

Replied for the town, As the queſtion is, Whether a piece of ground is to be at all liable in payment of tithes, ſo as to be the ſubject of localling a ſtipend? there can be no doubt but that can be properly tried in a proceſs of locality: And therefore the deciſion with reſpect to the loch, having been in a proceſs of valuation, does not vary the caſes; becauſe out of whatever ſubject a titular has no claim to tithes, a miniſter can have no claim to ſtipend. If there is at all any reaſon for not allowing deductions on account of incloſing, and other improvements, in proceſſes of augmentation and locality, it lies in this, that the heritor has himſelf to blame for not having got the extent of his teinds aſcertained by valuation. But in the preſent caſe, the town of *Inverneſs* could not obtain a valuation of the tithes of this new improvement; becauſe they apprehend no tithes are due out of them. And therefore the only thing to be done in ſuch a caſe, is to plead the point of law, whenever any claim is made to the tithes of grounds under ſuch particular circumſtances, in the ſame manner as an heritor would be intitled to do as to rents ariſing from a quarry, coal, mill, or other ſuch unteindable ſubject.

"The Lords found theſe lands gained off the ſea not teindable." G. C.

Act. *Montgomery*. Alt. *W. Steuart*. Reporter, *Shewalton*.

N° CLXXVI. 22d *February* 1759.

JAMES FRASER,

AGAINST

COSMO CAMERON of *Letterfinlay*.

Action ſuſtained on a bill which had lien over for twenty years.

THE father of *Coſmo Cameron* accepted a bill for *L.* 6 *Sterling*, dated the 16th *May* 1737, and payable to *Malcolm Fraſer* 10th *March* 1738. After the death of the accepter, at the diſtance of more than twenty years from the date of the bill, but ſome months leſs than twenty years from the term of payment, an action was brought by *James Fraſer*, to whom the bill was indorſed, againſt *Coſmo Cameron*, as repreſenting the accepter, for payment.

The Lord *Strichen* Ordinary "ſuſtained action on the bill, notwithſtanding the taciturnity, and in reſpect the defender did not inſiſt for a diligence to recover vouchers of payment; and decerned."

In a petition for the defender, it was *argued*, That beſides the taciturnity in this caſe, a preſumption aroſe, that the bill, though his father had not taken it up, had been paid, namely, from the facility and weakneſs of his father, who was regularly interdicted in the 1723, and was in uſe to pay the bills and debts he owed by orders upon his tenants, without taking up the vouchers againſt him: That his father had died when the defender was a child; and that he knew not into whoſe hands his father's papers had come.——In point of law, it was *argued*, That though by the law of *Scotland*, no preſcription, with reſpect to bills, was eſtabliſhed by ſtatute; yet, as the act 1681 refers, in the preamble, to the *cuſtom of other parts*; and that by the cuſtom of *England* bills preſcribe in *ſix* years, and of *France* in *five* years, and in other countries by a ſhort preſcription, it ſeemed agreeable to analogy, that they ſhould alſo be limited in this country to a ſhort endurance, otherwiſe the danger might be great; and that the court had in ſeveral inſtances refuſed action upon bills which had lien over for a long time, particularly where the accepter was dead before the action was brought, *Falconer*, N° 48. and N° 248. *New Collect.* N° 158.

"The Lords refuſed the petition without anſwers; and adhered to "the Lord Ordinary's interlocutor." W. J.

For the petitioner, *Montgomery*.

N° CLXXVII.

N° CLXXVII. 27th *February* 1759.

ALEXANDER HAMILTON and JOHN PUGET, voluntary assignees of Captain *Alexander Wilson*,

AGAINST

JOHN EARL of ROTHES.

Whether bona fide *payments made by the debtor, in a bond granted in the* Englisſh *form, are good againſt an aſſignee who has not intimated his right?*

THE Earl of *Rothes* became debtor to Captain *Wilſon* to the amount of *L.* 8840, for which he granted four bonds in the *Engliſh* form; the laſt of which was dated 2d *May* 1746. The intereſt of theſe bonds was paid up to *Ladyday* 1750.

In *Auguſt* 1750, Captain *Wilſon* found it neceſſary to draw bills upon Lord *Rothes:* and at the deſire of Lord *Rothes*, in order to enable him to anſwer theſe draughts, he furniſhed a credit to redraw for the money. This practice was continued from *Auguſt* 1750 to 17th *January* 1751; and the reſult was, that Mr *Wilſon* drew for *L.* 5000 and upwards, more than the amount of the Earl's redraughts upon him.

During the courſe of theſe tranſactions, Captain *Wilſon*, upon the 12th *September* 1750, aſſigned over two of the bonds to *Alexander Hamilton*, for the Sun fire-office; and upon the 12th of *February* 1751, he aſſigned over another of the bonds to *John Puget* merchant. Both theſe aſſignments were granted for valuable conſiderations; but none of them were intimated till after Captain *Wilſon*'s bankruptcy, and till after Lord *Rothes* had accepted the ſeveral draughts in queſtion.

Upon the 14th *February* 1751, he drew certain bills in favour of *Innes & Clerk*, which they indorſed to *Adam Fairholm*. Lord *Rothes* refuſed to accept theſe bills; and they were regularly proteſted.

Upon the 15th *February* 1751, Captain *Wilſon* became bankrupt; and from that period his eſtate became veſted in the legal aſſignees under his commiſſion of bankruptcy.

A competition aroſe, with reſpect to the debt due by the Earl of *Rothes* to the bankrupt, between the voluntary aſſignees, the legal aſſignees, and *Adam Fairholm*. In this competition the court preferred the voluntary aſſignees *primo loco*, Mr *Fairholm ſecundo loco*, and the legal aſſignees *tertio loco*.

In aſcertaining the balance due by Lord *Rothes*, this queſtion occurred, Whether Lord *Rothes* could take credit, in a queſtion with Captain *Wilſon*'s aſſignees, for the payments he had made in conſequence of Captain *Wilſon*'s draughts upon him, ſo as to diminiſh the ſums contained in the bonds aſſigned? or, Whether, on the other hand, as aſſignations by the law of *England* do not require to be intimated, the aſſignees were intitled to demand the full ſums in the bonds without regard to theſe payments?

It was *argued* for Lord *Rothes*, That if the queſtion was to be determined

mined by the law of *Scotland*, there could be no doubt of ſuſtaining the defence, becauſe payment made by a debtor before intimation is good againſt an aſſignee; but that even by the law of *England bona fide* payment, before knowledge of the aſſignment, is good againſt the aſſignee. By the law of *England*, a bond being a *choſe en action*, is not aſſignable, ſo as to enable the aſſignee to ſue at common law, in his own name; yet he has, by the aſſignment, ſuch a title to the paper and wax, that he may keep and cancel it. The aſſignee therefore muſt, at common law, bring his action in the name of the obligee or cedent; and in ſuch a caſe it would be competent to the debtor to plead every defence that was competent to him againſt the original creditor. It is true, that the aſſignee is permitted to ſue, in equity, in his own name; but certainly no court of equity would allow a debtor who had *bona fide* made payment to the cedent to be ſubjected to a ſecond payment. Theſe principles are eſtabliſhed by the authority of *Bacon*'s abridgement, *voce Aſſignment:* "In equity a bond is aſſignable for a valuable conſidera-
" tion paid, and the aſſignee alone becomes intitled to the money; ſo
" that if the obligor, (*i. e.* debtor), after notice of the aſſignment,
" pays the money to the obligee, he will be compelled to pay it over
" again; but payment to the obligee, without notice of the aſſignment,
" is good."—" An aſſignee muſt take it ſubject to the ſame equity
" that it was ſubject to in the hands of the obligee."

Anſwered, By the law of *England*, it is the aſſignment of the bond itſelf which carries right to the ſums due by ſuch bond, without neceſſity of intimation; and therefore, every debtor who means to act ſecurely, when he pays money to account of a particular bond, takes care to have the payment receipted on the back of the bond; nor can any debtor be compelled to pay his bond, without getting it up, or having his partial payments marked on the back of it. But whatever may be the caſe with reſpect to payments actually made to account of theſe bonds, though not marked on the back, it is a different queſtion, Whether Captain *Wilſon*'s draughts on the Earl in favour of third parties, can be deemed payment of theſe bonds in prejudice of the aſſignees? Nothing of this kind is expreſſed in the bills themſelves. They do not bear to be to account of theſe bonds; and, in fact, it was intended to carry on a practice of drawing and redrawing, and not to make payment of the bonds. The Earl, by accepting and paying more bills than he redrew for, became creditor to Captain *Wilſon* in the contents: and though, in accounting with Captain *Wilſon* himſelf, he might be intitled, *ex æquitate*, to ſet off the one againſt the other; yet that plea of equity cannot operate in a queſtion with the aſſignees, the purchaſers of theſe bonds for a valuable conſideration.

" The Lords found, That the Earl of *Rothes* is intitled to an allow-
" ance out of the ſums contained in his bonds, of the payments
" made by him in conſequence of Captain *Wilſon*'s draughts." W. J.

Act. *Lockhart, Ferguſon.* Alt. *Arch. Murray, Ro. Dundas.*

N° CLXXVIII.

N° CLXXVIII. 27th *February* 1759.

INHABITANTS of *Sneddon*,

AGAINST

The MAGISTRATES and TOWN-COUNCIL of *Paiſley*.

Juriſdiction of juſtices of peace with reſpect to bridges within the territory of a borough of barony.

THE magiſtrates and town-council of *Paiſley* granted feu-rights to a number of perſons, of a field of ground called *the Sneddon*, which lies within the territory of the borough of *Paiſley*, and upon the banks of the river *Cart*. Upon this piece of ground a conſiderable number of houſes were built; and the inhabitants, finding an inconveniency from the want of a bridge over the river at the *Sneddon* ford, reſolved to erect one at their own expence: and accordingly applied to the magiſtrates and town-council, deſiring their concurrence; and that they would appoint a committee to inſpect the ground, and to determine the moſt convenient place for the bridge.

The magiſtrates were averſe to the meaſure, becauſe there was a ſmall toll payable to them at another bridge over the river within 230 yards above the *Sneddon* ford: and they alſo feared that the erection of this new bridge would render the collecting of the duty of two pennies on the pint of ale brewed or imported into the town, more difficult and expenſive; beſides that the new bridge might poſſibly obſtruct the ſcheme of rendering the river navigable, as was propoſed by the act impoſing the two pennies on the pint of ale. For theſe reaſons the magiſtrates did not ſignify their concurrence to the building the new bridge.

The inhabitants of *Sneddon* applied therefore to the juſtices of the peace of the county of *Renfrew*, praying their authority for erecting the bridge.

The juſtices of the peace appointed the magiſtrates of *Paiſley* to give in their objections againſt this meaſure. This they refuſed to do; but moved a declinature of the juriſdiction of the juſtices. The juſtices of the peace, diſregarding this declinature, appointed a committee of their number to viſit the place where the bridge was propoſed to be built, and to conſider how far it could hurt the navigation of the river, or obſtruct the ford.

That committee reported their opinion, "That the bridge would be "of general advantage both to the town of *Paiſley* and the country ad- "jacent; and that they could ſee no damage it would occaſion, either "to the navigation of the river, or to the ford." The juſtices, upon this report, unanimouſly authoriſed the bridge to be built in a direct line with *Sneddon* ſtreet.

The magiſtrates obtained a ſuſpenſion of this decree of the juſtices; and *contended*, That the juſtices had no juriſdiction with reſpect to

the ſtreets, buildings, highways, or bridges, within their territory; for that, by ſeveral charters of erection, this borough had every privilege of a royal borough, excepting that of ſending a member to parliament: That the town of *Paiſley* was erected into a borough of barony by a charter from the crown in 1488, in favour of the Abbot of *Paiſley*, with power to him to elect annually a provoſt, bailies, and other office-bearers: That, in 1490, the Abbot diſponed the borough in favour of the provoſt, bailies, and community; which was confirmed in the 1658, by the lord of erection of the abbacy, who diſponed the ſuperiority and common lands thereof in favour of the magiſtrates, council, and community: all which, in the year 1665, was confirmed by a charter of reſignation from the crown: That, in conſequence of theſe charters, more ample privileges are granted to this borough than what in general belong to boroughs of barony; and the bailies have the ſole power of receiving reſignations of the burgage-lands, and of giving ſeiſins thereon: and they have always exerciſed the excluſive power of regulating the public police within the borough: That as the erecting of a bridge within their territory is a very important article of police, they muſt have the ſole power of judging in the firſt inſtance concerning that matter, ſubject to the review of the court of ſeſſion: for although the juſtices of peace have been in uſe to interpoſe their authority with reſpect to highways, bridges, and ferries, in ſuch boroughs of barony as are not incorporations, but depend upon the baron; yet no attempt has ever been made to exerciſe that authority in ſuch boroughs of barony as are proper incorporations, and governed by their own magiſtrates; and the magiſtrates have, in this caſe, good reaſon to oppoſe this bridge, on account of the loſs it would occaſion to the town's revenue, as well as the injury that would ariſe from it to the intended navigation of the river.

Anſwered, The uſefulneſs of the bridge, both to the town and country, is ſufficiently proved by the report of the juſtices of the peace who examined into that matter as a committee; which is alſo proved by the readineſs of the inhabitants of *Sneddon* to build it at their own expence. It can occaſion no obſtruction to the navigation of the river, more than other bridges do, which have been built acroſs navigable rivers. And as to the two branches of the town's revenue, the inhabitants of *Sneddon* have offered to take a leaſe of theſe from the magiſtrates at the ſame ſums they now yield.

With reſpect to the juriſdiction of the juſtices, the ſtatutes which give them a ſuperintendency over highways, bridges, and ferries, have made no diſtinction, whether theſe are ſituated within the territory of any borough or not; nor has there been any judgment of the court reſtricting their power in that manner. None of the charters in favour of the borough of *Paiſley* have granted any powers as to ferries or bridges excluſive of the general juriſdiction veſted in the juſtices by the public law. This paſſage over the river *Cart* is part of a public highway; and as every perſon is at preſent at full liberty to paſs by the ford, and that the juſtices could undoubtedly authoriſe the clearing the ford of any obſtructions, they have an equal right to authoriſe the building a bridge. And indeed, as the ground on each ſide of the river is at this place private property, the bridge might have been built at the expence of theſe proprietors, without any authority from the

juſtices,

juſtices, were it not that one end of the bridge is intended to reſt upon a public highway.

Obſerved on the bench, The town of *Leſlie* hold of the crown; yet it never was doubted, that it was ſubject to the juriſdiction of the juſtices of peace.

" The Lords repelled the reaſons of ſuſpenſion, and allowed the " bridge to be built." W. J.

For the chargers, *Lockhart*. Alt. *Wight*, *T. Miller*.

N° CLXXIX. 6th *March* 1759.

JAMES CRAWFORD, and others, CREDITORS of *Robert* and *John Dunlops*,

AGAINST

JOHN BROWN and JAMES CRAW, LEGAL ASSIGNEES under the commiſſion of bankruptcy.

Competition between arreſters *of debts due in* Scotland *to a bankrupt, and* legal aſſignees *under a commiſſion of bankruptcy.*

Robert and *John Dunlops* carried on a company-trade at *Rotterdam*. In *June* 1755 *John Dunlop* went over to *London*; and ſoon after, in *July* 1755, his partner ſtopped payment. A petition was given in to the Lord Chancellor on the 2d *Auguſt* 1755, for a commiſſion of bankruptcy; which was immediately iſſued; and, upon the examination of two witneſſes, who deponed to an act of bankruptcy on the 14th *July* 1755, the commiſſioners found, that *John Dunlop*, before the date and iſſuing forth of the commiſſion, did become bankrupt. On the 23d *Auguſt*, they appointed *John Brown* and *James Craw* aſſignees to the bankrupt's effects.

James Crawford and others, creditors of the company, uſed arreſtments in the hands of ſeveral perſons who were debtors to the company, in *Edinburgh*, *Glaſgow*, *Perth*, and *Dundee*, poſterior to the 14th *July* 1755, but before the application for a commiſſion of bankruptcy.

The aſſignees under the commiſſion of bankruptcy brought an action againſt the company's debtors. Appearance was made for the arreſters; and a competition enſued between them and the aſſignees.

Pleaded for the arreſters, That they had uſed the only proper diligence allowed by the law of *Scotland* to affect the debts due to the company: That this diligence was completed before the commiſſion of bankruptcy in *England* was applied for: That their diligence could not be diſappointed by after proceedings in another country; eſpecially as theſe proceedings were, in this caſe, carried on in a colluſive manner, and the commiſſion of bankruptcy iſſued upon a falſe ſuggeſtion, as if the debtor had been a reſidenter in *England*, which he truly was not. 2*dly*, That the debts affected by the creditors arreſtments were due to *John* and *Robert Dunlops* and company; but the commiſſion of bankruptcy

bankruptcy was taken out againſt *John Dunlop* only, which could not affect the debts due to the company, but only *John Dunlop*'s ſhare of the free remains of the copartnery-ſtock.

Pleaded for the aſſignees under the commiſſion, That *John Dunlop* had reſided at *London* for four weeks before he abſconded; which was ſufficient to intitle his creditors to apply for a commiſſion of bankruptcy againſt him: That by the law of *England*, the effects of the bankrupt are veſted in the commiſſioners and their aſſignees, from the firſt act of bankruptcy, which happened, in this caſe, before any of the arreſtments were uſed by the competing creditors; and therefore the aſſignees ought to be preferred to theſe arreſters, though their diligence was executed before the application for the commiſſion: That this was ſo determined in the competition of Captain *Wilſon*'s creditors, 1ſt *February* 1755.

2*dly*, Although the commiſſion is only taken out againſt *John Dunlop*; yet, as partner, he was intitled to recover the whole copartnery-effects, to be applied for payment of the debts. He could have voluntarily aſſigned them to truſtees for that purpoſe; and the legal aſſignation under the commiſſion muſt have the ſame effect with his voluntary deed.

Replied, The whole of the debts arreſted are ſubject to the juriſdiction of the courts in *Scotland*, and to none other. None of the debts were either contracted in *England*, or payable there. The effect given to commiſſions of bankruptcy in *England*, by poſitive ſtatute, can have no effect beyond the juriſdiction of their law, no more than the retroſpect eſtabliſhed in *Scotland* by the act 1696, can be effectual in *England* or *Holland*, or than the retroſpects eſtabliſhed by ordinances in *France* can be effectual here or in *England*.

The deciſion in the competition of Captain *Wilſon*'s creditors does not apply. The court, in that caſe, preferred the aſſignees only with reſpect to debts contracted after the *Engliſh* form, or payable in *England*; becauſe ſuch debts were conſidered as in ſome manner ſituated in *England*, and ſubject to the juriſdiction of the courts there: but with reſpect to *Scots* debts, a contrary judgment was given, and the arreſters were preferred in the only caſe where it was tried, 13th *November* 1747, *Thomas Ogilvie contra* the creditors of *John Aberdein*. Beſides, the commiſſion was fairly taken out againſt Captain *Wilſon*, who was actually ſettled in *England*.

Duplied, It can make no difference, that the debts in this caſe were contracted in *Scotland*, and payable there; becauſe it is a general maxim, That *mobilia non habent ſequelam, ſed ſequuntur perſonam*; which muſt apply with greater force to debts which are conſidered as *jura incorporalia*; and therefore this competition muſt be governed by the ſtatutes of *England*, where *John Dunlop* reſided when the commiſſion was taken out againſt him.

"The Lords preferred the arreſtments in the hands of the company's "debtors reſident in *Scotland*, preceding the 2d *Auguſt* 1755, to "the legal aſſignees." W. J.

For the arreſters, *Miller, Ferguſon.* Alt. *Macintoſh.* Reporter, Lord *Minto.*

N° CLXXX.

N° CLXXX. 6th *March* 1759.

GEORGE WILSON maſon in *Edinburgh*,

AGAINST

JOHN FORREST and ALEXANDER MAXWELL merchants in *Edinburgh*.

The husband fiar in a bond for lent money taken to himſelf and wife, and longeſt liver of them, in conjunct fee and liferent, and to the children procreate between them, and their heirs, in fee.

IN 1754, Meſſ. *Forreſt* and *Maxwell* granted bond for *L.* 900 *Sterling*, payable at *Candlemas* 1755, " to *George Wilſon* and *Eliſabeth Ramage*, " ſpouſes, or longeſt liver of them two, in conjunct fee and liferent, " and to the children lawfully procreate or to be procreate betwixt " them, and to the heirs and executors of the ſaid children, in fee," with annualrent and penalty as uſual: *Proviſo*, " That it ſhould be " leiſom and lawful to the ſaid *George Wilſon* and *Eliſabeth Ramage*, " ſpouſes, jointly, by themſelves alone, without conſent of their ſaid " children, to uplift, diſcharge, aſſign, or otherwiſe ſettle and diſpoſe " of the foreſaid ſums of money, in whole, or in part, at their plea- " ſure, notwithſtanding of the above ſubſtitution."

At the time the money was lent, and this bond granted, there was a ſon and daughter of *George Wilſon* and his ſaid ſpouſe exiſting. *Eliſabeth Ramage* died before the debt was uplifted, or any alteration made upon the deſtination of the bond. *Wilſon* afterwards inſiſted for recovering payment of the whole debt, without concurrence of either the ſon or daughter, who were ſtill living.

Forreſt and *Maxwell* ſuſpended on this ground, That they were not in ſafety to pay to *Wilſon* the charger, in reſpect that by the bond the fee of the money was veſted in the children, under a reſerved power to the father and mother, jointly, of uplifting the debt; and as during the life of the mother, the money could not have been taken up without her conſent, ſo, ſince her death, it having become impoſſible to obtain ſuch conſent, the charger could not ſingly uplift or effectually diſcharge this debt.

Anſwered for the charger, That it is clear from the conception of the bond, that he, the father, is fiar of the ſum. Had this money been ſo provided in a contract of marriage, there would have been no doubt of the father's powers to uplift and diſpoſe of it for onerous cauſes, though a reſtraint might have been implied from the nature of the covenant againſt gratuitous deeds; but where a man voluntarily lays out his own money in this way during a marriage, without any previous obligation, no reſtraint whatever is to be implied, nor is any here expreſſed in the bond. The clauſe bearing, that the charger and his wife jointly might uplift the ſum without conſent of the children, was truly ſuperfluous; ſeeing there is no fee provided to the children that could make their conſent neceſſary; and it was never thought, that a

clauſe declaring a fiar to have the powers he would have without it, could have the effect to deprive him of any of the powers inherent in his fee, and competent to him by the general conſtruction of the deed; as it is a rule, That every man ſhall have the full exerciſe of his property, in ſo far as he is not reſtrained. The clauſe would not be ſufficient even to tie him down to require his wife's conſent, were ſhe alive; and could it be ſtrained ſo far as to import an interdiction in favour of his wife, while ſhe lived, yet that interdiction muſt fly off by her death.

"The Lords found, That the huſband had right to uplift and diſ-
" charge the bond, without conſent of the children, now that
" the wife is dead; and therefore found the letters orderly pro-
" ceeded." D. R.

Act. *Ferguſon.* Alt. *Rae.* Reporter, *Strichen.*

N° CLXXXI. 6th *March* 1759.

Sir JAMES CLERK of *Pennycuik*, Baronet,

AGAINST

WALTER BENNET, and ALEXANDER MILES, his aſſignee.

Conventional irritancy of a tack not purgeable after decreet of removing is extracted.

IN *January* 1748, Sir *John Clerk* granted a tack of the farm of *Burghlie* to *Walter Bennet*, his heirs and aſſignees, for the ſpace of nineteen years after *Martinmas* 1749, at the yearly rent of *L.* 411, 10 *s.* 8 *d. Scots*, payable, by equal portions, at *Whitſunday* and *Martinmas*; but under this condition, "That if one year's rent ſhould be reſt-
" ing unpaid half a year after it falls due, then, and in that caſe, the
" tack ſhould become void and null, and of none effect."

Bennet the tackſman committed the management of this farm to his wife, who made ſundry payments to Sir *John Clerk*, and, after his death, to his ſon and heir Sir *James*; but there ſtill remained a balance due at *Candlemas* 1758 of *L.* 1051 : 16 : 6 *Scots*. *Bennet* himſelf, in the 1757, fell into ſuch bad circumſtances, that he was impriſoned by another creditor for a ſmall debt, and took the benefit of the act of grace.

In *January* 1758, Sir *James Clerk* raiſed a proceſs before the ſheriff of *Edinburgh* againſt *Bennet*, concluding both for payment of the above arrear, and that he ſhould be removed from the farm, as having incurred the irritancy. The libel recited the tack, and irritant clauſe thereof, and concluded, "That in regard the ſaid *Walter Bennet* has incur-
" red the irritancy of the foreſaid tack, by ſuffering more than a
" year's rent to be unpaid half a year after it was due; therefore, and
" in terms of the late act of ſederunt, he ſhould be decerned and or-
" dained inſtantly to flit and remove," *&c.*

To this proceſs *Bennet* compeared, denied his wife's *præpoſitura*, and claimed

claimed allowance of ſundry articles of compenſation. The ſheriff, on the 8th of *March*, found the *præpoſitura* proved, and repelled ſundry of the articles of compenſation. *Bennet* preſented a reclaiming petition; and, upon adviſing the ſame, with anſwers for Sir *James*, the ſheriff, on the 22d *March* 1758, allowed a proof as to one article, adhered as to the others, "and in regard there is more than one year's rent due "by the defender, after allowance of the ſaid article, decerned in the "removing as libelled." Upon this decerniture a precept was extracted, and a charge to remove given on the 31ſt of *March*; upon which *Bennet* preſented a bill of ſuſpenſion, and obtained a fiſt.

The proceſs, ſo far as reſpected the concluſion for payment of the arrears of rent, was ſtill carried on before the ſheriff; who, on the 5th of *April*, found *Bennet* liable for the ſums libelled, and decerned.

On the 13th of *April*, *Bennet* aſſigned his tack to *Alexander Myles*, a brewer, in ſecurity, as he alledged, of the ſums *Myles* ſhould advance for him, and in truſt *quoad ultra* for *Bennet*'s behoof; but *ex facie* the aſſignment was abſolute, and *Myles* immediately entered to poſſeſſion. On the 14th of *April*, he intimated his right to Sir *James*, and made offer to pay the arrear found due by *Bennet*; which Sir *James* refuſed to accept of; and thereupon *Myles* conſigned the money in the hands of the clerk of the bills, together with a bond of caution for the five ſubſequent crops.

On the 15th *April*, the ſheriff refuſed a petition for *Bennet*, in which payment was offered, and adhered to his interlocutor of the 5th of *April*; as alſo, "decerned the officers to charge *Bennet* to flit and remove "within forty-eight hours after the charge, under the pain of ejection." ——On this a decreet was extracted.

In the ſuſpenſion of the removing, it was *objected* for *Bennet* and *Myles*, 1*mo*, That, upon a proper count and reckoning, it would appear, that the irritancy was not incurred. 2*do*, The ſheriff's interlocutor of the 22d of *March* was only founded on the act of ſederunt, as it ſimply found, that a year's rent was due; and did not find, that that year's rent had been reſting half a year after its becoming due, in terms of the irritant clauſe of the tack; and therefore the interlocutor was erroneous, as, by the act of ſederunt, the ſheriff ought firſt to have aſſigned a term for the tenant's finding caution for the arrears, and five ſubſequent crops, and not to have ſummarily decerned in the removing. And, 3*tio*, Suppoſing the decerniture to have proceeded on the conventional irritancy, yet the ſheriff ought not to have decerned in the removing, at the ſame time that he found the arrear due; but ought to have allowed a reaſonable time for the tenant's paying that arrear after it was found due, as he could not know till then how much he was to pay, where the balance was the ſubject of diſpute. It would be very hard, if a tenant's being miſtaken in the grounds of his counter claims ſhould afford the means of forfeiting him of his tack, before he could be aware of his danger; and here an offer of payment was made, and the money conſigned, while matters were yet entire, and even before the final interlocutor was pronounced.

Anſwered for Sir *James*, 1*mo*, That *Bennet*'s claims of compenſation were all groundleſs, and had been juſtly over-ruled; and the extent of the arrear found due, clearly ſhowed, that the conventional irritancy had been incurred. 2*do*, The ſheriff's interlocutor of the 22d *March*, decerning

decerning in the removing, muſt be applied to the conventional irritancy, which was ſpecially libelled and inſiſted on; and not to the irritancy introduced by the act of ſederunt; for the act was only mentioned in the libel, as regulating the manner of removing, when once the conventional irritancy was found to be incurred. And, 3*tio*, It is an eſtabliſhed rule, That conventional irritancies of tacks *ob non ſolutum canonem*, cannot be purged when found incurred, but by immediate payment at the bar. Here no ſuch offer was made till long after the precept of removing had been extracted, and a charge given upon it. If a tenant's proponing groundleſs claims and defences againſt ſuch an action were to ſtop the removing till all of them were diſcuſſed, ſuch removings might be defeated or poſtponed for almoſt any length of time. It is ſufficient to ſupport the ſheriff's decerniture, that it appears the fact was ſuch as he found; ſo that the irritancy had been then truly incurred; and it was in ſuch a caſe *ultra vires* of the ſheriff, to have aſſigned terms, *ex proprio motu*, for purging that irritancy. Nor could the offer and conſignment made by *Bennet*'s aſſignee, after extracting and executing the precept, ſtop the effect of the irritancy, which was already declared, even before the aſſignation was granted by *Bennet*, who had never offered, and was unable, to pay. The decerniture to remove, contained in the interlocutor of the 15th of *April*, was altogether ſuperfluous.

"The Lords found the letters orderly proceeded, and decerned." D. R.

For Sir *James, Rae.* Alt. *Maſqueen.* Reporter, *Colſton.*

N. B. As *Bennet*'s bill of ſuſpenſion had been paſſed by three Ordinaries, "in reſpect of the conſignation of the bygone rents found due "by him," a warrant on the clerk to deliver up the money to Sir *James* was afterwards demanded: but as the money was proved to have belonged to *Myles*, who advanced it in expectation that his right to the tack would have been ſuſtained, the Lords ordered the ſame to be redelivered to him.

N° CLXXXII. 8th *March* 1759.

SCHAW MACINTOSH of BORLUM,

AGAINST

WILLIAM and ANGUS MACINTOSHES.

A condition in a bond of reverſion, requiring the redemption to be made with the proper money and means of the reverſer, is not effectual to bar redemption.

IN the year 1734, *Schaw Macintoſh* of *Borlum*, for the ſum of 44,000 merks, executed a diſpoſition of his lands of *Borlum*, in favour of *William* and *Angus Macintoſhes*; who, of the ſame date, granted him a bond of reverſion, declaring, That the lands ſhould be redeemable at the end of twenty-five years, but under certain reſtrictions. The clauſe

clauſe of reverſion was expreſſed in theſe words. " In caſe the ſaid " *Schaw Macintoſh*, or any heir-male to be lawfully procreated of his " body, (ſecluding hereby expreſsly all other heirs, whether male, of " line, tailzie, or proviſion, whether legal or conventional, and debar- " ring them from any right or title hereto, being an expreſs condition " of granting hereof), can and ſhall (with the proper *money and means* " of him the ſaid *Schaw Macintoſh*, or of an heir-male lawfully to be " procreated of his body, to be made up and acquired by them, or " either of them, without contracting of debt, and without raiſing the " ſame on any rights or ſecurities on the other lands heritably be- " longing to him the ſaid *Schaw Macintoſh)* content and pay to us, or " our foreſaids, the ſum of 44,000 merks, as the price and purchaſe- " money paid by us, and that at the term of *Whitſunday* 1759; then, " and in that caſe, we, or our foreſaids, ſhall accept and receive the " ſaid haill ſum, and ſhall fully and amply denude ourſelves of, and " convey and rediſpone to the ſaid *Schaw Macintoſh*, and the ſaid " heirs-male of his body, the foreſaid lands."

Schaw Macintoſh, ſome months preceding the term of *Whitſunday* 1759, brought a declarator of redemption againſt *William* and *Angus Macintoſhes*, in order that it might be found, that he was intitled to redeem the lands, and that his proceſs of declarator might be held as a ſufficient premonition for that purpoſe.

The defenders *inſiſted*, 1*mo*, That the purſuer had no title to redeem the lands; for that he was not poſſeſſed of funds of his own to pay the price, but was aſſiſted by other perſons, who meant to purchaſe the lands from him ſo ſoon as they were redeemed. 2*do*, That the diſpoſition to the lands in their favour was granted for a full and adequate price: That the reverſion was no part of the original bargain, but was a gratuitous conceſſion in favour of the purſuer, of whoſe family they were deſcended; and the intention of it was, that if his circumſtances, or thoſe of the heir-male of his body, ſhould enable them to purchaſe back the lands at the end of twenty-five years, the purchaſers were willing to give them up; but it was not the intention of parties, to allow the ſeller the benefit of this redemption, when he was not in condition to keep the lands, but only intended, after the redemption, to ſell them again at a higher price.

Anſwered, The purſuer has no occaſion to explain, whether he intends to redeem the lands with money of his own, or with money which he has borrowed; becauſe, though the bond of reverſion makes a diſtinction of this ſort, yet it is a diſtinction to which the law gives no ſupport; for it is altogether *jus tertii* to the defenders, whether the money paid to them is borrowed by the purſuer or not. This point was expreſsly decided 16th *July* 1696, Lord *Bargeny* againſt *Fergusſon* of *Kilkerran*. " It being provided in a reverſion, that the lands ſhould " be redeemable only with the reverſer's own money; and yet the mo- " ney, when offered, was borrowed from another; the Lords found no " ſpecialty nor reſtriction laid on the debtor in this caſe, but that he " might redeem the creditor with any money, *cui nihil deerat cum* " *ſuum recipit*, unleſs it had been more clearly contained and provided " for."

If any effect were to be given to ſuch clauſes, a pretext would be afforded to diſappoint every reverſion. A debtor is obliged to ſubmit al-

moſt to any terms which his creditor inſiſts upon; and at the time ſuch reverſions are granted, the debtor often flatters himſelf, that he will be able to make the redemption by money of his own; but it would be hard to exclude him from the benefit of the reverſion, though he ſhould be diſappointed of this expectation. It is difficult to aſcertain the free amount of any man's fortune; and his right to take the benefit of a reverſion ought not to depend upon ſuch an inquiry.

2*do*, The wadſetters in this caſe had a ſufficient return for their money, by the poſſeſſion of the lands, and by a ſale which they were allowed to make of a conſiderable wood; and therefore this was not a ſale, but a lucrative wadſet; and the clauſe of reverſion ought, on that account, to be favourably interpreted for the reverſer.

"The Lords found, That the purſuer was intitled to redeem the "lands libelled; and that this proceſs was a ſufficient premonition "for that purpoſe." W. J.

Act. *Johnſtone, Ferguſon.* Alt. *Hamilton-Gordon, Lockhart.* Reporter, *Bankton.*

N° CLXXXIII. 8th *March* 1759.

MARY SCOT,

AGAINST

MARY SHARP and her huſband.

A daughter who was executor and univerſal legatar to her mother, found liable to aliment her ſiſter-uterine, who was deſtitute of any fund of ſubſiſtence.

MAry *Scot* brought an action againſt *Mary Sharp*, and *James Lumiſden* of *Ranniehill* her huſband, for an aliment, founded upon the following grounds.

That ſhe was the only daughter of Lady *Mary Sharp*, by her firſt huſband Mr *Scot* of *Haycheſter:* That Lady *Mary* was again married to Sir *James Sharp*, by whom ſhe had a ſon, who predeceaſed her and the defender *Mary Sharp:* That Lady *Mary*, after the death of her ſon, executed a *will*, by which ſhe appointed *Mary Sharp* her ſole executor and univerſal legatar; and to that *will* ſhe ſubjoined theſe words: "I "recommend *Mary Scot* to her charity."

That *Mary Sharp*, upon Lady *Mary*'s death, received conſiderable effects by virtue of this *will:* That Lady *Mary*, while ſhe lived, was under a natural obligation to aliment the purſuer, her only ſurviving child of her firſt marriage, who had no other means of ſupport: That ſhe had accordingly, while ſhe lived, allowed her an aliment of *L.* 20 *Sterling* a-year: That *Mary Sharp*, as ſole executor of her mother, became ſubject, in her place, to the ſame obligation; which was alſo ſtrengthened by the condition annexed to the *will*, recommending *Mary Scot* to her charity.

It was *anſwered*, That *Mary Sharp* received very little benefit from her mother's ſucceſſion; for that the debts due by Lady *Mary* had exhauſted

hauſted almoſt the whole of her effects: That, at any rate, as the defender was not bound to aliment her ſiſter upon the footing of relation, ſo ſhe was not bound to aliment her as repreſenting their common mother: for that the obligation to aliment does not affect the diſponees or legatees of a defunct: and the clauſe ſubjoined to the *will* was no more than a ſimple recommendation, which was not obligatory; and if it was, could never import an obligation to pay a yearly allowance.

It appeared by a proof, That *Mary Sharp* had received, in conſequence of her mother's *will*, after all deductions, above *L.* 230 *Sterling* clear, which ſhe had poſſeſſed ſince the year 1754, when Lady *Mary* died.

" The Lords found *Mary Scot* intitled to an aliment of *L.* 12 *Sterling* " yearly, to commence from the date of the proceſs." W. J.

Act. *Nairn, Wedderburn, Johnſtone, Ferguſon.* Alt. *Duncan, J. Craigie, Lockhart.* Clerk, *Kirkpatrick.*

N° CLXXXIV. *March* 1759.

MARGARET BETT and her HUSBAND,

AGAINST

ROBERT HARDIE.

Qualified Oath.

Margaret Anderſon, in a teſtamentary ſettlement, conveyed, *inter alia*, to *Margaret Bett* her daughter, a bill for *L.* 7 *Sterling*, drawn by *Robert Hardie* upon and accepted by *Trent* of *Pitcullo*, and indorſed by *Hardie* to *Anderſon*.

Hardie had been often intruſted by *Margaret Anderſon* with the cuſtody of her writs, and care of her affairs; and upon her death, her daughter put the ſaid bill, with ſeveral other writs, into his hands, and ſome time after married *David Innes*.

After the marriage, *Margaret Bett* and her huſband purſued an exhibition before the ſheriff of *Fife* againſt *Hardie*; in which, after exhibiting certain writs, he deponed, " That he knows of no other bills be- " longing to the defunct, except a bill which was due by *Pitcullo* for " *L.* 7, which the deponent uplifted, and gave to *John Bett* the pur- " ſuer's brother, at her deſire; and ſhe deſired him to do this in *July* or " *Auguſt* laſt, (being before her marriage); and thinks, that *John Bett* " got the money ſince the purſuer's marriage."

The ſheriff found, " That the defender ought to prove otherwiſe than " by his own oath, that the purſuer gave him orders to pay the con- " tents of the bill to her brother." *Hardie*'s procurator thereupon cauſed cite the purſuer to depone on that fact; and ſhe was accordingly examined in preſence of *Hardie*, and deponed, " That ſhe never in her " life deſired *Hardie* to get up the money in *Pitcullo*'s bill, and give it " up to her brother *John Bett*."

Margaret

Margaret Bett and her huſband then commenced a new proceſs before the ſheriff againſt *Hardie*, for payment of the contents of the bill. The ſheriff, in reſpect of her oath in the exhibition, decerned againſt *Hardie*; who brought the cauſe into the court of ſeſſion by ſuſpenſion.

Pleaded for the ſuſpender, The quality contained in his oath, *viz.* of uplifting the contents of the bill, and paying it away by the charger's orders, was intrinſic, and ſhould have obtained his abſolvitor before the ſheriff. Where a debt is conſtituted by oath, and the ſame oath declares, that the debt was paid to the creditor's order, ſuch quality is intrinſic; as found 9th *December* 1664, *Learmont contra Ruſſel*; *January* 1727, *Lauder contra Macgibbon*; and 14th *January* 1737, *Moffat contra Moffat*.

Anſwered for the charger, 1*mo*, The ground of debt was conſtituted by a writ lodged in the ſuſpender's hands for the charger *Margaret Bett*'s behoof, and the ſuſpender could have no right to uplift or diſcharge the debt without a written order from her. The ſuſpender's exception, therefore, was only probable by the writ or oath of the charger, and his deponing upon it conſequently extrinſic; 21ſt *December* 1679, *Allan contra Young*; 24th *December* 1679, *Hume contra Taylor*; and 23d *December* 1707, *Brown contra Dow*.—2*do*, The quality is extrinſic, ſeeing it was contained in the ſuſpender's oath emitted in the proceſs of exhibition, where the matter referred to him was not the conſtitution of the debt, or the exiſtence of the bill as ſuch, (as in the caſes quoted for him), but only, whether or not the bill or writ was in his cuſtody? *Fountainhall*, 2d *July* 1712, *Forbes contra* Lady *Culloden*. 3*tio*, The ſuſpender repudiated and loſt the benefit of his own oath, by his citing the charger, and her deponing negatively to his allegation. And, 4*to*, The charger's marriage veſted the right of the bill or contents in her huſband; and therefore the ſuſpender was *in mala fide* thereafter to pay the ſame to *John Bett*.

Replied for the ſuſpender, There was no need for a written order to enable the ſuſpender to uplift the contents of the bill, and apply the money, as the bill was extinguiſhed by delivery of it to the debtor; and conſequently the exiſtence of the debt reſts upon the ſuſpender's oath alone. Were it otherwiſe, clerks or ſervants intruſted with getting payment of bills, and applying their contents, might be unjuſtly ſubjected at the pleaſure of their maſters. 2*do*, The quality was properly adjected to the oath in the exhibition, as the ſuſpender was called upon not only to tell, whether he had the bill in his cuſtody? but, if he had it not, to declare how he had put it away. 3*tio*, The ſuſpender never referred the matter to the charger's oath; his procurator acted, in that reſpect, without any mandate from him: and ſuppoſing both of them had erred through ſimplicity and ignorance, it would be hard to let him ſuffer by that means; eſpecially as he was no gainer by paying the money to the charger's own brother, who was in want. And, *laſtly*, Though he paid the money to him after the charger's marriage, yet he had received her orders, and uplifted the contents of the bill, before the marriage; which therefore could not hinder the application.

The court ſeemed to conſider the quality of *Hardie*'s oath as intrinſic, and that the citing *Margaret Bett* to depone at *Hardie*'s inſtance, proceeded from ignorance or ſimplicity; and therefore was not to be held binding as a judicial reference made by him to her oath.

"The Lords ſuſtained the reaſons of ſuſpenſion." D. R.

Act. *Dav. Rae.* Alt. *W. Steuart.* Reporter, *Woodhall.*

N° CLXXXV.

N° CLXXXV. 16th *June* 1759.

JOHN WILSON, and other HERITORS in the city of *Glaſgow*,

AGAINST

The MAGISTRATES of *Glaſgow*.

The trade of a royal borough is liable in payment of a part of the ceſs.

BY the ancient laws and uſage of *Scotland*, taxations for the ſupport of government were primarily impoſed upon the prelates, the barons, and the boroughs, with relief to each of them from the perſons living under their reſpective orders. The clergy paid the one half of thoſe taxations; the barons two thirds, and the royal boroughs one third, of the other half; ſo that the proportion paid by the boroughs was one ſixth of the total taxation. That proportion payable by the boroughs was, by the act 112. 1587, declared to continue after the alteration made in the ſtate of the church-lands at the reformation.

The method of levying theſe taxations from the perſons ſubject thereto, was ſpecially directed by the acts impoſing the ſame; and particularly, in royal boroughs, ſtentmaſters were ordered to be named for adjuſting the proportions payable by the inhabitants in reſpect of their trade or merchandiſe, as well as of their rents or landed property.

By the act of convention 1667, the new method of levying the land-tax, which had been introduced in the times of the troubles in King *Charles* I.'s reign was adopted; and the ſame was appointed to be raiſed, not by the old tax-roll, but by way of ſupply of ſo many months ceſs, according to the valuation made of the ſhires and boroughs in the year 1660. The act of convention declares, "That all perſons having *real eſtates* of lands, teinds, annualrents, due by infeftment, feu-duties, tack-duties, and others of that nature, are and ſhall be liable for the foreſaid ſupply." Certain commiſſioners for the ſhires, and the magiſtrates of the boroughs for the time, are appointed to ſettle the proportions, and collect the ceſs within their bounds, with power to appoint ſtentmaſters for aſſiſting them in ſo doing. Further, thoſe commiſſioners are thereby impowered to aſſeſs the inhabitants within the counties and boroughs at certain rates, for a proportional relief of the ſupply of that year 1667; "in reſpect that the *land* and *real rent* of the kingdom is liable for this ſupply, and that the ſaid land-rent is under many other great burdens."

This act 1667 has been referred to in ſubſequent acts impoſing ſupplies; but the relief thereby given to the landed intereſt is not repeated in them.

By the 12th act of the parliament 1690, the excluſive privilege of foreign trade, import and export, is of new granted to the royal boroughs, in conſideration of the boroughs being "one of the ſtates of this kingdom, bearing a *ſixth part* of all public impoſitions," *&c.*

The magiſtrates of *Glaſgow*, ſome time after the Revolution, laid

down a rule for levying the ceſs within that city; which was, that the lands and houſes in it ſhould pay $2\frac{1}{2}$ *per cent.* of the rents, for every two months ceſs that ſhould be impoſed, and that the traders and inhabitants ſhould pay according as they ſhould be rated by the ſtentmaſters.

At that period, and for ſome time after, the $2\frac{1}{2}$ *per cent.* of the rents, for two months ceſs, did not pay the whole ceſs, and the remainder was levied from the traders and inhabitants; but, for two or three years laſt paſt, by the increaſe of buildings, and riſe of rents, that proportion for the landed intereſt, which was ſtill levied according to the rent for the time, paid the whole ſupply; ſo that no part of the ceſs fell upon the trade of the city.

John Wilſon, and others, heritors within the city, thereupon brought a proceſs againſt the magiſtrates, concluding, 1*mo*, To have it found, That the laying the whole ceſs upon the landed intereſt, and nothing upon the trade, is illegal and oppreſſive; and that the traders ſhould be ſtented in two thirds of the ceſs. 2*do*, That the magiſtrates ſhould pay back to them *L.* 2135 : 7 : 4 *Sterling*, as two thirds of the ſtent impoſed upon the heritors for the three years laſt paſt; or, at leaſt, that the whole ſtent for three years to come ſhould be laid on the trade. And, 3*tio*, That the magiſtrates ſhould be ordained to pay back to the purſuers, what has been levied by them more than the whole *quota* of ceſs payable by the borough, and charges of collecting in theſe years.

Pleaded for the defenders, in anſwer to the *firſt* concluſion of the libel, 1*mo*, As the legiſlature has intruſted the magiſtrates of boroughs with impoſing and levying the ceſs thence payable, the weakening their hands or ſhaking their powers would be attended with very bad effects. 2*do*, There has been no innovation attempted by the magiſtrates, who have followed the rule laid down by their predeceſſors, ſanctified by the chearful acquieſcence of all parties concerned for above half a century. When this rate upon the landed intereſt did not pay the whole ceſs, they were not burdened with more: and although, by the increaſe of rents, the whole ceſs is now paid by the landed intereſt; yet no landlord is poorer by this than he was formerly, but, on the contrary, is richer in proportion to the increaſe of his rent. And, indeed, though the ceſs is thus nominally paid by the landholders; yet it is in reality paid by the traders, who poſſeſs the houſes in the town. And, 3*tio*, Although the old taxations were laid partly on trade; yet by the act of convention 1667, the former practice was innovated, and a new method eſtabliſhed, impoſing the land-tax by way of ſupply from lands and *real* eſtates, and not from perſonal eſtates or trade: which new method has been followed ever ſince, with this variation, that the temporary relief given to the landed intereſt for the year 1667, from the inhabitants and traders, has never ſince been renewed; ſo that the burden has been left entirely upon the *real* eſtates within counties and boroughs.

Anſwered for the purſuers, 1*mo*, Though the convention of boroughs have the ſole power of rating each borough with its proportion of ceſs, yet the magiſtrates of the particular boroughs are only intitled to name ſtentmaſters for diſtributing the proportion laid on the borough among the inhabitants; and anciently the inhabitants had the naming of their own ſtentmaſters: but if any unequal diſtribution is made by ſuch

ſuch ſtentmaſters, relief muſt certainly be had from the ſupreme court. 2*do*, No length of practice can eſtabliſh an unjuſt diſtribution of this kind. It is the continuance of that practice which the purſuers complain of, ſeeing, by the alteration of circumſtances, that rate which was originally juſt, has become the contrary; ſo that the heritors now pay the whole ceſs, inſtead of the half, as at firſt. The riſe of rents has been occaſioned by buildings and improvements, which are now more expenſive than formerly; and the trade of this city has increaſed by the proportion of at leaſt ten to one more than the landed intereſt in the ſame period. And, 3*tio*, The act of convention 1667 did not make any alteration as to the intereſts of the perſons formerly liable in taxation within borough; later acts of parliament, particularly the 12th act 1690, ſuppoſe that trade is liable in a part of the ceſs; and ſuch has been the general ſenſe of the nation ever ſince, as appears by the known practice of all boroughs where there is any trade, of rating the ceſs between it and the landed intereſt.

As to the other branches of the libel, the defenders *contended*, That no rule could be fixed for aſcertaining the rate payable by the traders, without making every trader diſcover the circumſtances of his trade, which would be highly dangerous; and therefore it muſt be diſcretionary in the magiſtrates and their ſtentmaſters, to ſettle that proportion: That the ceſs already levied had been applied for the ſervice of government; and therefore could not be recovered; and they denied, that more had in any year been levied than paid the full ceſs, and charges of collecting.

Obſerved on the bench, The old taxation was laid on the boroughs in reſpect of their trade and privileges; and the ceſs is now impoſed upon them on the ſame account; and hence, when a borough of regality gets a communication of privileges from the royal boroughs, it becomes bound to relieve them of part of the ceſs. There is no preſcription here from the practice, as the ceſs is annually impoſed.

" The Lords found, That as the heritors of lands, houſes, and other " heritable ſubjects, within the city of *Glaſgow*, ſo the other bur- " geſſes, in reſpect of their trade and manufactures within the " ſame, are liable in the payment of the ceſs impoſed by act of " parliament upon the city of *Glaſgow*; and that the magiſtrates " of *Glaſgow*, the commiſſioners for ordering, raiſing, and levy- " ing the ſaid ceſs, and the ſtentmaſters appointed by them, ought " to rate the ſame upon the heritors and other burgeſſes accor- " dingly; and remit to the Lord Ordinary to proceed on the " cauſe."

N. B. The purſuers having afterwards *inſiſted*, That the magiſtrates ſhould ſpecify the proportion in which they propoſed to lay the ceſs of the current year upon the trade and the landed intereſt, the magiſtrates declined to do ſo; and that point being reported, 8th *Auguſt* 1759,

" The Lords found it not neceſſary to give more particular direc- " tions as to the proportion of the ceſs between the trade and " the landed intereſt, than what are contained in the (above) " interlocutor of the 16th *June*."

Thereafter the magiſtrates having proportioned the ceſs for the year 1759,

1759, by laying three fourths on the houſes, and one fourth on the trade, the purſuers complained, that this proportion was unequal and unjuſt, *alledging*, That the ſtock in trade of the inhabitants of *Glaſgow* was much more than double the value of the houſes; and therefore *inſiſted*, that the Lords ſhould rectify the ſaid proportion, by laying two thirds on the trade, and one third on the houſes.——To which it was *anſwered*, That the magiſtrates, before appointing ſtentmaſters, and fixing rules for levying the ceſs for the year 1759, had inquired particularly into the ſtate of trade in that city, and had taken the advice of the moſt conſiderable inhabitants, both landholders and traders, as to the proportion which ſhould be laid on the trade for that year; the reſult of which was, that the council had come to an unanimous reſolution of laying no more than one fourth upon the trade for the year 1759. The magiſtrates and council are the beſt judges of the circumſtances of their borough, and in what proportion the ceſs ought to be paid by the landholders and traders; and the legiſlature has given them full power to determine in that matter: neither can it be fixed by any certain rule; for the traders of ſuch a town as *Glaſgow* can better afford to pay the half of the ceſs in one year, than the fourth of it in another.

This point being reported on the 6th *February* 1760, it was *obſerved on the bench*, That though ſome part of the ceſs muſt be paid by the trade, the preciſe proportion was not fixed by any ſtatute. This muſt be left to the diſcretion of the magiſtrates; and unleſs it can be made appear, that they have been guilty of a groſs abuſe of power, the court of ſeſſion cannot interpoſe.

"The Lords refuſed to give relief; and adhered to their former interlocutors."

D. R.

Act. *Lockhart, Ferguſon.* Alt. *Miller, And. Pringle.* Reporter, *Kames.* Clerk, *Gibſon.*

N° CLXXXVI. 19th *June* 1759.

ROBERT ABERCROMBIE,

AGAINST

JAMES BRODIE.

A debtor liberated from priſon on the act of grace, may be again impriſoned on the ſame diligence.

Robert Abercrombie engaged to ſerve *James Brodie*, ſaddletree-maker in *Glaſgow*, as his journeyman for a term of years; but after borrowing from his maſter *L.* 10 *Sterling*, for which he granted a bill, *Abercrombie* deſerted his ſervice, and went to *Edinburgh*. *Brodie* raiſed a caption on the bill, and cauſed him to be apprehended and impriſoned in the 1753; and after being confined ſome time, and alimented by *Brodie*, he was liberated in terms of the act of parliament 1696, commonly called *the act of grace*.

In 1757, *Abercrombie* returned to *Glaſgow*, and worked with other maſters,

maſters, without paying his debt to Mr *Brodie*; who thereupon again impriſoned him upon the ſame caption.

Abercrombie got a bill of ſuſpenſion and liberation paſſed without oppoſition; and commenced a proceſs of wrongous impriſonment againſt *Brodie*, concluding for the penalties impoſed by act 6. 1701; which proceſs, and the ſuſpenſion, came to be diſcuſſed together.

Pleaded for *Abercrombie*, The purpoſe of allowing a creditor to impriſon his debtor upon a caption, is to operate payment of his debt, but not to ſtarve a poor debtor who is altogether unable to pay. Hence it is provided by the act of parliament 1696, That, upon the priſoner's making oath, that he is not able to aliment himſelf, the creditor muſt either aliment him, or the magiſtrates of the borough may ſet him at liberty.

Here the purſuer *Abercrombie* was liberated on his deponing to that purpoſe, and making a diſpoſition *omnium bonorum* to the defender and his other creditors. The defender, by refuſing to aliment him, tacitly conſented to that liberation; and as the act could afford no benefit to the priſoner, if he might be immediately recommitted, it follows, from the nature of the caſe, that the creditor muſt be barred from again apprehending his perſon on the ſame diligence, until at leaſt the circumſtances of the debtor are ſo far altered, that the creditor can reaſonably expect thereby to operate his payment. As to that alteration, the creditor is not to determine; but there muſt be a cognition, by a competent judge, before he again proceeds to apprehend and impriſon the debtor; as was found in a caſe obſerved by *Forbes*, 10th *December* 1709, *Law contra White*.

Anſwered for *Brodie*, Every diligence iſſued by the court of ſeſſion may be lawfully executed, unleſs it is ſuſpended by the ſame court. The act 1696 does not declare the debt or diligence to be diſcharged by a liberation upon it, but only introduced a remedy in favour of the royal boroughs, which were overcharged with maintaining poor debtors who were caſt into priſon. If the creditor refuſes to give aliment, the magiſtrates may liberate the debtor; but the act does not abſolutely prohibit the creditor to impriſon him again, even *ſine cauſæ cognitione*; nor does it declare or imply, that ſuch liberation by an inferior magiſtrate, ſhall be equivalent to a ſuſpenſion iſſued by the ſupreme court. Had a cognition been intended before a recommitment, the method of taking it would have been directed; but the act is ſilent in that reſpect: nor is that defect ſupplied by any other rule or practice; ſo that a creditor cannot know how he is to have the matter examined, or by whom, ſuppoſing he were diſpoſed or obliged to take that previous precaution. Beſides, the law has pointed out the way in which a debtor may obtain a perſonal protection from all his creditors, namely, by a regular proceſs of *ceſſio bonorum*; and the legiſlature could never mean to give a liberation on the act of grace an equal effect; which, however, is the tendency of the purſuer's plea. Nor can the circumſtance of the purſuer's having granted a diſpoſition *omnium bonorum* upon his liberation alter the caſe; for the act 1696, does not require the debtor to grant ſuch a deed; and although the magiſtrates (as in this caſe) commonly think fit to take ſuch a diſpoſition from the debtor; yet the creditor having been no party to the tranſaction, nor taken any benefit from it, cannot be thereby prejudiced in his legal

rights and privileges. Finally, ſhould the purſuer prevail, it would be fatal to all the labourers and poor people in the country, who would get no credit; for having nothing wherewithal to pay, but the fruit of their bodily labour, if once releaſed on this act of grace, they would remain free, as it ſcarce ever happens, that among ſuch people, any material alteration of their circumſtances could be alledged. And as to the deciſion *Law contra White*, in 1709, it is a ſingle one, and not obſerved in the collections of Preſident *Dalrymple* and Lord *Fountainhall* during that period.

The court at firſt found it irregular in *Brodie* to commit *Abercrombie* to priſon upon the ſame caption a ſecond time, *ſine cauſæ cognitione*; but upon a review of the caſe, the interlocutor was altered. *It was obſerved on the bench*, That although a liberation on the act 1696 does not *legally* diſcharge the diligence, or reſtrain the creditor from again putting it in execution; yet if he commit a moral wrong, by uſing that diligence in an oppreſſive manner, he is cenſurable in *equity*, and the debtor may obtain relief by ſuſpenſion.

"The Lords found, That *Brodie* was at liberty to put his diligence "in execution againſt *Abercrombie* a ſecond time, and to incarce- "rate him thereupon, notwithſtanding of his former liberation "upon the act of parliament 1696, for the aliment of poor pri- "ſoners; and therefore aſſoilzied from the proceſs of wrongous "impriſonment, found the letters orderly proceeded, and decern- "ed; but found no expences due." D. R.

For *Brodie*, *Geo. Wallace*. Clerk, *Kirkpatrick*.

N° CLXXXVII. 19th *June* 1759.

JOHN BOGLE of *Hutcheſon*,

AGAINST

DAVID BOGLE.

A tack granted upon deathbed reduced.

John Bogle was proprietor of the two-merk lands of *Hutcheſon*; which, in his contract of marriage, he provided to himſelf, and the heirs of the marriage; whom failing, to his own heirs whatſoever. Of that marriage he had three ſons; *William*, *Thomas*, and *David*.

Upon the marriage of *William* the eldeſt ſon, *John* the father diſponed to him the one half, *pro indiviſo*, of the foreſaid tenement. The father and ſon afterwards poſſeſſed each a half of the lands, in a kind of run-rig, for many years, till *William* let his half to *John Reid*; and ſoon after died, leaving a ſon, *John*, and ſeveral other children.

When old *John* was in the 74th year of his age, and after contracting the diſeaſe of which he died, a tack was executed between him and his youngeſt ſon *David*; whereby he let, for the ſpace of thirty-eight years, the half of the lands which had remained in his natural poſſeſſion, to *David*, and the heirs of his body; whom failing, to his other ſon

ſon *Thomas*, and his heirs and aſſignees; reſerving to himſelf and his wife the liferent of the dwelling-houſe and yard. On the other part, *David* and *Thomas* were taken bound to pay to their father and his heirs *L.* 100 *Scots* of yearly rent, together with the public burdens effeiring to the half of the lands of *Hutcheſon*.

John, the granter of the tack, died within fourteen days after its date; and was ſucceeded in the property of the ſaid half of the lands contained in the tack, by *John* his grandſon, then a minor; who, upon his coming of age, brought a reduction againſt his uncle *David*, of the ſaid tack, on the head of deathbed; and the circumſtances of the granter at the time were clearly proved as above mentioned.

Pleaded by the defender, That it is only *alienations* of heritable ſubjects which are reducible *ex capite lecti*, and where the heir can qualify leſion from ſuch deeds; whereas tacks, ſuch as this, being onerous, and acts of ordinary adminiſtration, may be lawfully and effectually executed at any time of the granter's life, while he retains a ſound judgment.

Anſwered for the purſuer, The law of deathbed was introduced to preſerve the ſucceſſion to the right heirs; and to this day takes place in the ſmalleſt as well as the greateſt heritage. It ſtrikes againſt, not only direct alienations, but every device or meaſure calculated for creating an incumbrance on the heritage prejudicial to the heir. It is admitted, that the proprietor of an eſtate muſt, for public utility, retain the adminiſtration of it *uſque ad ſupremum vitæ halitum*; but this tack was not a neceſſary or common act of adminiſtration, but a device to create a burden on the heir in favour of the granter's younger children. For, *1mo*, It is granted for a rent below the true value of the ground. *2do*, It is of an uncommon endurance. *3tio*, It comprehends the manſion-houſe and yard of this ancient though inconſiderable family. *4to*, By the intermixed poſſeſſion of the lands, the heir cannot let or ſell his remaining half to advantage, while the other half is under this leaſe. And, *5to*, The ſubſtitution of one ſon after another is uncommon, and carries the appearance of a deed of proviſion by the father for the benefit of his two younger ſons. The reduction of ſuch a tack on the head of deathbed is therefore not an extenſion of that law, but agreeable to the reaſon and intendment of it, and to the analogy of many deciſions; particularly, 20th *December* 1735, *Chriſtieſon contra Carr*; and 15th *November* 1757, Children of *Hugh Campbell*.

Replied for the defender, *1mo*, The tack is granted for an adequate rent, as it is equal to what *Reid* paid for the other half of the lands, or very little ſhort of it. *2do*, Experience has proved the inconveniency, both to maſter and tenant, of limiting tacks to a ſhort period of time; and the utmoſt length the objection to this tack's endurance could go, would be to reſtrict it to ſuch a ſhorter period as might be thought proper. *3tio*, There is properly no manſion-houſe on either half of the lands, but only an onſtead for each farm; and the purſuer may, if he pleaſes, have his choice of the two. *4to*, The two halves of the lands have been always poſſeſſed as ſeparate farms: ſo the inconveniency is not greater than formerly; and could not be remedied by this reduction, as both lie run-rig with other grounds. And, *5to*, The ſubſtitution of *Thomas*, the granter's other ſon, cannot affect this tack, more than if it had been granted in ſuch terms to perfect ſtrangers. Nor does

does the deciſion, *Chriſtieſon contra Carr*, which is a ſingle one, apply to this caſe; as there the tack was given on deathbed of the whole of the granter's eſtate for three nineteen years, which was conſidered as a ſpecies of *alienation*.

" The Lords reduced the tack; and decerned." D. R.

Act. *Miller*. Alt. *Jo. Dalrymple, Lockhart*. Clerk, *Pringle*.

N° CLXXXVIII. 27th *June* 1759.

ROBERT MILLER merchant in *Cumbernauld*,

AGAINST

ROBERT SAWERS ſhoemaker.

Juriſdiction of admiral depute.

Sawers being charged on a decreet of the admiral-depute of *Quarrel-ſhore*, to make payment of the price of ſome leather he had bought from *Miller*, obtained letters of ſuſpenſion on theſe grounds:

1*mo*, That this is not a maritime or ſeafaring cauſe, and to ſuch cauſes the admiral's juriſdiction is limited by the act 1681; conſequently the decreet charged on is null.

2*do*, Although the high admiral and the judge-admiral may, by conſuetude, have acquired a juriſdiction in mercantile matters, not maritime; yet that the admirals-depute have no juriſdiction in matters not maritime.

3*tio*, The office of admiral-depute is purely miniſterial, to take care of wrecks, *&c.* not judicative.

4*to*, The ſuſpender does not live within this admiral-depute's territory.

Anſwered for *Miller*, 1*ſt*, That the act 1681 does not reſtrict the admiral's juriſdiction to maritime cauſes; it only eſtabliſhes an excluſive juriſdiction to the high court of admiralty, and prohibits other judges from judging in ſuch cauſes.

2*dly*, By uninterrupted practice, admirals-depute have a cumulative juriſdiction in mercantile cauſes, not maritime.

3*dly*, Such juriſdiction as the admiral has, he may delegate to his deputes; and that their office is not only miniſterial, but likwiſe judicative, is implied in the act 1681, which ſtatutes and declares, *That the decreets* and acts of the inferior courts of admiralty ſhall be ſubject to review and reduction of the high court of admiralty.

It appeared to the court a novelty, for an admiral-depute to determine, *in foro contentioſo*, betwixt perſons reſiding at a diſtance from the ſea, and in a queſtion not maritime: They therefore ſiſted proceſs, and granted warrant for citing the admiral-depute, and his conſtituent, to appear in court, and to anſwer to ſuch queſtions as ſhould be put to them. But upon reading this admiralty-deputation, it appeared, that the ſuſpender did not live within the territory therein deſcribed; and therefore

" The Lords ſuſpended the letters." J. C.

Act. *Baillie*. Alt. *David Dalrymple*, for the ſuſpender.

N° CLXXXIX.

N° CLXXXIX. 4th *July* 1759.

The CHILDREN of WILLIAM GRAHAM, and other adjudgers of the lands of *Baltillie*,

AGAINST

Captain JOHN GRAHAM of *Greigſton*, and JAMES SMITH in *Kingſmuir*.

A ſeiſin, bearing delivery of liferent ſtate *and* ſeiſin, *though proceeding on a diſpoſition of the* fee, *veſts only the real right of* liferent.

Thomas Glover was proprietor of part of the lands of *Baltillie*, holding of the crown. In order to convey the ſuperiority of theſe lands to Sir *Thomas Hope* of *Craighall*, and to continue the property to himſelf and his heirs, he, in 1678, entered into a contract with Sir *Thomas*, whereby he diſponed to him the lands; and Sir *Thomas* became bound to get himſelf infeft in the ſame by the crown, and then to rediſpone the lands to *Glover*, and his heirs, to be held of Sir *Thomas* and his ſucceſſors in feu.

Sir *Thomas Hope* dying before the contract was implemented, Sir *William Hope*, his ſon and heir, in implement thereof, at *Glover*'s deſire, granted, in 1694, a feu right and diſpoſition of the lands of *Baltillie*, " to *Alexander Reid*, and *Anne Glover* his ſpouſe, eldeſt lawful daughter " to the ſaid *Thomas Glover*, the longeſt liver of them two, *in conjunct* " *fee and liferent*, and the heirs procreate or to be procreate betwixt " them; which failing, to the ſaid *Alexander Reid* his heirs and aſſig- " nees, *heritably and irredeemably*." The deed contained an obligement upon Sir *William* to infeft the ſaid *Alexander Reid* and *Anne Glover* in the ſame terms with the above words of the diſpoſitive clauſe; but the precept of ſeiſin thrown into the clauſe of regiſtration, was thus expreſſed: — " And to the effect the ſaid *Alexander Reid*, and *Anne Glover* " his ſpouſe, may be infeft and ſeiſed *as above written*, I deſire and re- " quire you, *&c.* my bailies in that part, that, immediately on ſight " hereof, ye paſs to the grounds of the ſaid lands, and there give and " deliver *liferent* ſtate and ſeiſin, with actual, real, and corporal poſ- " ſeſſion of the ſame, to the ſaid *Alexander Reid* and *Anne Glover* ſpou- " ſes, or their certain attornies in their names, bearers hereof, by deli- " verance of earth and ſtone of the ground," *&c.*

Upon this diſpoſition and precept, *Alexander Reid*, in *March* 1712, after the death of his wife *Anne Glover*, took infeftment, in this manner. The inſtrument recited the tenor of the diſpoſitive clauſe and obligement to infeft as above, and afterwards the precept of ſeiſin, *verbatim*. Then it deſcribed the act of infeftment thus: " After reading and pu- " bliſhing of the foreſaid diſpoſition, and precept of ſeiſin above writ- " ten, therein contained, *&c.* the ſaid bailie gave and delivered *life-* " *rent* ſtate and ſeiſin, corporal, actual, real, and peaceable poſſeſſion " of the ſamen lands, to the ſaid *Alexander Reid*, and that by deliver-

" ance to him, in his hands, of earth and ſtone of the ground of the " ſaid lands, accepting thereof, as uſe is, none oppoſing or contradict- " ing the ſame, *after the form and tenor of the foreſaid diſpoſition, and pre-* " *cept of ſeiſin* above written, therein mentioned, in all points."

The ſaid *Alexander Reid* and his wife contracted conſiderable debts. In 1699 they granted an heritable bond on the lands of *Baltillie* to *John Graham* for 550 merks, on which he was infeft the ſame year. In *May* 1712, *Reid* granted an heritable bond of corroboration to *Thomas Gourlay* for a debt of *L.* 526 *Scots*, on which infeftment was taken in *March* 1725. The children of *William Graham*, and *William Seton* writer to the ſignet, being alſo conſiderable creditors, adjudged the lands of *Baltillie* in 1726; and Captain *Graham* of *Greigſton* and *James Smith*, who came to have right to the above heritable bonds, likewiſe adjudged.

In a proceſs of ranking and ſale, after *Reid*'s death, the other creditors-adjudgers claiming to be ranked *pari paſſu* with *Graham* and *Smith* on their adjudications, the latter inſiſted to be preferred to them on their infeftments in 1699 and 1725.

Objected by the adjudgers, That the *real* or complete feudal right to the *fee* of the lands was not veſted in *Alexander Reid*, the common debtor, by his infeftment in *March* 1712, but only the right to the *liferent* of thoſe lands; and therefore he was not in a condition to grant any heritable bond or infeftment, to burden or affect the ſubject beyond the endurance of his own life.

Anſwered for *Graham* and *Smith*, 1*mo*, It is inconteſtable, that the property of the lands was diſponed by Sir *William Hope* to *Alexander Reid*, as it was never doubted, that a conveyance to a huſband and wife *in conjunct fee and liferent*, and their heirs, whom failing, to the huſband's heirs, veſts the *fee* in the huſband. Nay, even ſuppoſing the diſpoſitive clauſe had been conceived in favour of the huſband and wife in *liferent*, and to the heirs to be procreate betwixt them, whom failing, to his heirs and aſſignees, without the words *conjunct fee*, the fee muſt have been found to be in the huſband, deſcendible to his heirs, and affectable by his creditors; becauſe it is a principle in our law, That the fee or property of lands cannot be *in pendente*, but muſt be veſted in ſome perſon exiſting at the time; and where lands are ſo diſponed, the liferent is to be conſtructed an *uſusfructus cauſalis* in the huſband, elſe the fee would be ſuſpended till the ſucceſſion ſhould devolve on his heirs by his death. Their being called as *heirs*, ſhew they are to have no right till that event happen; and they could not ſucceed as *heirs* to him, if he had not the property, but only a liferent.—So it has been eſtabliſhed by many authorities and deciſions; particularly, 25th *November* 1735, creditors of *Robert Frog contra* his children. That ſuch muſt be the conſtruction of the liferent ſo provided in the precept of ſeiſin in queſtion, is equally clear; as that precept is only a clauſe relative to the former parts of the ſame deed, which ſhow the undoubted intention of the parties to veſt the fee in the huſband. Even ſuppoſing the precept had been ſo extended in a ſeparate writing, the import of it would be the ſame; as it bears to be granted, " to the effect the ſaid " *Alexander Reid*, and *Anne Glover* his ſpouſe, may be infeft and ſeiſed *as* " *above written.*" And it will not be preſumed, that a precept granted for the purpoſe of implementing the obligation on Sir *William Hope* to infeft, as therein mentioned, will fall ſhort of its intent, when the words can admit of a meaning agreeable to it. 2*do*, The ſame argument

ment holds as to the inſtrument of ſeiſin, where the conjunct fee and liferent and ſubſtitution is twice repeated, both in the recital of the diſpoſitive-clauſe, and of the obligement to infeft, and *liferent* ſtate and ſeiſin is given, " after the form and tenor of the foreſaid diſpoſition and " precept of ſeiſin in all points;" which could only be by veſting in *Alexander Reid* the property intended to be given him: and he was accordingly conſidered to be proprietor by the other creditors themſelves, who adjudged from him as ſuch.

Replied for the adjudgers, 1*mo*, The diſtinction between the *jus in re* and the *jus ad rem* of the *Roman* law, has been adopted in ours; and thence is derived the difference between a *real* and a *perſonal* right to lands. The rule, *Nulla ſaſina, nulla terra,* is well underſtood and eſtabliſhed. A diſpoſition, charter, or precept of ſeiſin, may give the grantee a *perſonal* right or title to lands, but it is the infeftment which veſts the complete *real* right in him. It is admitted, in the preſent caſe, that by the tenor of the diſpoſitive clauſe, the *perſonal* right to the *fee*, or *uſusfructus cauſalis*, was given to *Reid:* but it is apprehended the ſeiſin only veſted in him the real right to the *liferent*. A right of fee comprehends a *liferent;* but not *e contra;* and therefore the diſponer of the fee certainly might have granted a warrant for infefting, or the diſponee have taken infeftment in the *liferent*, diſtinct from the *fee*: which appears to have been done in this caſe. The reference in the precept to the diſpoſitive clauſe, can be of no ſtronger effect than it would have been, had the lands by that clauſe been diſponed to *Reid* ſingly, his heirs and aſſignees. A precept ſubjoined to ſuch an abſolute diſpoſition, ordering only *liferent ſtate and ſeiſin* to be given, could never have authoriſed an infeftment in the *fee*; becauſe the maxim would have applied, *Quod potuit et voluit, non fecit.* Beſides, a liferent was here certainly intended to be given to the huſband as well as the wife; and had ſhe been infeft, her ſeiſin muſt have been conceived in the ſame terms: and conſequently it may be well ſuppoſed, that the real right to be given him was intended to be no broader; eſpecially as the rule, That a fee cannot be *in pendenti*, was not ſo well underſtood when this diſpoſition was granted, as it is now. 2*do*, Had the precept, as well as the diſpoſitive clauſe, been clearly intended to give the *real* right of fee; yet, as it is the infeftment which veſts that *real* right, the ſame can be no broader than is *de facto* given by the infeftment. Seiſins are by law ordered to be recorded, and not the warrants of them, as the right given by the infeftment is alone to be regarded by the lieges. Infeftments are not made by reference; for nothing is underſtood in them but what is expreſſed. *Craig*, and all our lawyers, agree, that the utmoſt preciſion is requiſite in inſtruments of ſeiſin. Thus an infeftment of annualrent was found null, becauſe it did not bear expreſsly delivery of the ſymbols contained in the precept, but only, that ſtate and ſeiſin was given, *conform to the tenor of the precept*, *February* 1684, *Murray contra Hope*. The words of this infeftment, *liferent ſtate and ſeiſin*, are, by all our writers on ſtyles, and the univerſal practice of notaries, underſtood to mean an infeftment in the *liferent* alone, according to the common ſenſe and meaning of thoſe words, and in oppoſition to *heritable ſtate and ſeiſin*, which are conſtantly uſed to denote an infeftment of fee; the other words, *actual, real, and peaceable poſſeſſion*, being common to both. 3*tio*, In the caſe of *Frog*, it was indeed found, That a grant of lands to a man in *liferent*, and to the

the heirs of his body in *fee*, made him *fiar*; but there the diſpute turned upon the import of the deſtination, not of the infeftment, which bore, that the bailie gave *ſtatum et ſaſinam hæreditariam*; a circumſtance which has eſcaped the reporter of that caſe. And further, the queſtion was there between the creditors of the diſponee and his own children, who could, at any rate, only take as heirs to him, and conſequently be liable in his debts; whereas here it is between creditors equally onerous, and who cannot be hurt in their preſent plea, by their having for ſome time miſtaken the nature of the right which was in their debtor.

"The Lords found, That only the *liferent* was veſted in the perſon of "*Alexander Reid* by his infeftment; and remitted to the Lord Or- "dinary to proceed accordingly." D. R.

For *Graham* and *Smith*, *D. Græme*, *Ferguſon*. For the adjudgers, *Rae*. Reporter, Lord Juſtice-clerk. Clerk, *Kirkpatrick*.

N° CXC. 5th *July* 1759.

GEORGE MUSCHET merchant in *Stirling*,

AGAINST

WILLIAM CHRISTIE merchant there.

Objection to a witneſs.

Muſchet being copartner with *Corſar* in a ſkinner-trade, *Corſar*, in conjunction with one *Barclay*, imbezzled, and fraudulently diſpoſed of the ſkins to *Chriſtie*.

Muſchet complained of this fraud by petition to the magiſtrates, and craved, That *Corſar* and *Barclay* ſhould be incarcerated; and that the ſkins imbezzled ſhould be ſequeſtrated. He thereafter brought an action againſt *Chriſtie* for repetition of the ſkins.

Theſe proceſſes were conjoined; and *Chriſtie* offered to prove, by *Corſar* and *Barclay*'s oaths, that he fairly bought the ſkins, and paid for them.

Objected, That they are not habile witneſſes; they are defenders in the conjoined proceſſes; they may loſe or gain by the determination in the cauſe; for their evidence may tend to make them liable in high penalties for the fraud committed.

Anſwered, Though they are defenders in the conjoined proceſſes; yet their evidence in the one caſe will not be evidence in the other.

They can neither gain nor loſe by their evidence in this caſe; becauſe they are liable either to *Chriſtie* or to *Muſchet* for the price of the ſkins; and it is a matter of no conſequence to whom they are found liable.

Though they may gain or loſe by the cauſe; yet ſuch witneſſes are received in many caſes. The owner of goods ſtolen is a good evidence when the proſecution is at the inſtance of the crown, for theft; and yet his oath, ſo taken, may have ſome weight in the after queſtion, Whether the goods ſhall be reſtored to him? In the ſame manner, the evidence of an innkeeper is admitted in the proſecution of the perſon who

who robbed his houſe, though it may have the effect to free him from the action on the edict *Nautæ, caupones.*

The inferior court refuſed to admit of their evidence.

" On an advocation, the Lords remitted the cauſe *ſimpliciter.*" J. C.

For *George Muſchet, Walter Steuart.* Alt. *Macqueen.* Clerk, *Juſtice.*

N° CXCI. 13th *July* 1759.

CHARLES BRODIE,

AGAINST

The MAGISTATES of ELGIN.

Eſcape of a priſoner.

Charles Brodie brought an action againſt the magiſtrates of *Elgin*, for payment of *L.* 149, 10*s.* and intereſt, on account of their having allowed *Gilbert Barclay*, his debtor, to eſcape from the priſon of *Elgin*, where he had been confined for that debt.

It was *proved*, in defence, That *Barclay* had made his eſcape, not by the inſufficiency of the priſon, nor with the connivance of the jailor, but by means of falſe keys, which he had procured to be made at a neighbouring town; and that he had an accomplice in making his eſcape, who, from without, opened the doors with theſe falſe keys.

Anſwered, The priſoner could not have procured the impreſſion of the keys from which the falſe keys were made, without the connivance, or at leaſt the negligence of the jailor. *2dly*, It was *proved*, That the night of the eſcape, as well as upon other occaſions, the jailor had neglected to put on the catbands and padlock on the outward door, which ought to make the magiſtrates liable, in terms of the act of ſederunt 11th *February* 1671; by which it is declared, " That in all time " thereafter, the court would find the magiſtrates of boroughs liable " for the debts of rebels who ſhould eſcape from the priſon, in caſe " they have not ſufficient catbands upon the doors of their priſons, " *and lock the ſame ilk night*, leſt the rebels pick or break up the locks."

Replied, It is clear by the proof, and particularly by the oath of the accomplice, That the jailor had no acceſſion to the eſcape; and it was eaſy for the priſoner, during the courſe of a long confinement, by the aſſiſtance of an accomplice, to get the impreſſion of the keys, without any culpable neglect of the jailor. *2dly*, Though the catbands were not locked the night of the eſcape, yet as the eſcape was not facilitated by this omiſſion, it cannot be a good ground for ſubjecting the magiſtrates. The eſcape was made by falſe keys, and the doors were opened by the accomplice from without; ſo that the catbands, though locked, could not have prevented it.

" The Lords found the defences relevant and proved; and therefore " aſſoilzied the defenders." W. J.

Act. *Lockhart.* Alt. *Hamilton-Gordon.*

N° CXCII. 20th *July* 1759.

JAMES MACNEIL, deputy-collector of the customs at *Greenock*,

AGAINST

MARGARET MATTHIE, relict of *William Taylor*.

An adjudication acquired by an apparent heir, and possession assumed upon it during his father's life, is not reducible on the act 1695.

Alexander Taylor was possessed of a house in *Greenock*; for attaching which, an adjudication was led in the year 1709, at the instance of one of his creditors, *Lilias Morison*, for the accumulate sum of *L.* 387 *Scots*. The adjudger obtained a charter from the superior, and was infeft in the year 1713. In the year 1719, another adjudication was led at the instance of another creditor, *Magdalen Bryce*, for the accumulate sum of *L.* 516 : 19 : 6 *Scots*.

William Taylor, the eldest son of *Alexander*, purchased these two adjudications from the creditors in the years 1721 and 1724; and entered to the possession of the house during the lifetime of his father. In the year 1725, his father being still alive, he obtained a declarator of expiration of the legal upon the first adjudication led, in 1709.

William Taylor having married *Margaret Matthie*, he executed, upon the 1st *June* 1741, a postnuptial contract of marriage with her, by which he conveyed this house, and other subjects, to himself and his wife in conjunct fee and liferent, and to the children of the marriage in fee.

After the death of *William Taylor*, his relict continued the possession of the subject without challenge, till *James Macneil*, as having right to an adjudication led, in the 1726, against the same subject, upon a debt due by *Alexander Taylor*, brought a process of reduction of the two adjudications upon which *William Taylor*'s right was founded, *insisting*, That as they were acquired by *William Taylor*, the eldest son of *Alexander* the debtor, and were the title under which he possessed after his father's death, they fell under the sanction of the second clause of the act 1695, which declares, That every such adjudication shall be reputed a behaviour as heir; and that consequently the diligences, by coming into his person, became extinguished *confusione*; at least that they could not stand in competition with the onerous creditors of his father.

The second clause of the act 1695 is in these words. "If any apparent heir for hereafter shall, without being lawfully served or entered heir, either enter to possess his predecessor's estate, or any part thereof, or shall purchase, by himself, or any other for his behoof, any right thereto, or any legal diligence or other right affecting the same, whether redeemable or irredeemable, otherwise than the said estate is exposed to a lawful public roup, and as the highest offerer thereat, without any collusion, his foresaid possession or purchase shall be repute a behaviour as heir, and a sufficient passive title to make

" make him repreſent his predeceſſor univerſally, and to be liable for " all his debts and deeds, ſicklike as if the ſaid apparent heir poſſeſſing " or purchaſing, as ſaid is, were lawfully ſerved and entered heir to " his ſaid predeceſſor; declaring always, That the ſaid apparent heir " may bring the ſaid eſtate to a roup, whether the eſtate be bankrupt " or not."

Anſwered for the defender, 1*mo*, The words of the ſtatute appear to apply only to the caſe of a proper apparent heir entering to poſſeſs, or acquiring debts, after his predeceſſor's death. The deſignations of *predeceſſor* and *apparent heir* are correlative terms. It is abſurd to call a man *a predeceſſor* while he is alive; and it is improper to deſign his ſon *apparent heir* during that period. The apparent heir who comes under the ſanction of this clauſe of the act 1695, is deſcribed to be one who has it in his power to ſerve or enter heir, and, in place of taking that method, chuſes to enter to poſſeſs his predeceſſor's eſtate, and to purchaſe legal diligences affecting it. To apply any of thoſe things to a ſon during his father's life, is impoſſible. It cannot be ſaid, that he neglects to ſerve or enter heir; and it would be equally abſurd to ſay, while his father is alive, that he is poſſeſſing his predeceſſor's eſtate. Further, the poſſeſſion or purchaſe is declared to be reputed a behaviour as heir, and a ſufficient paſſive title to infer a repreſentation of the predeceſſor univerſally: but a behaviour as heir will only apply to one who has it in his power to enter to a predeceſſor who is dead; for it is impoſſible to repreſent a predeceſſor univerſally while he is alive, or to be liable in all his debts and deeds, the extent of which cannot be known till his death: and the manner of the repreſentation is deſcribed in the ſtatute to be the ſame as if the apparent heir poſſeſſing or purchaſing were lawfully ſerved and entered to his predeceſſor, which ſuppoſes him capable of entering heir at the time of the purchaſe: and the clauſe concludes with allowing the apparent heir to bring the eſtate to a roup; which evidently ſuppoſes, that the predeceſſor is then deceaſed.

2*do*, The words of this ſtatute ought not to be extended beyond their proper meaning; becauſe the ſanction is extremely ſevere, depriving the apparent heir, not only of all benefit from the acquiſition he may have made, but condemning him in an univerſal repreſentation. The ſtatute is alſo a correctory law; and upon that account likewiſe ought not to be extended. Accordingly the court has reſtricted the general words, *debts and deeds*, made uſe of in the firſt clauſe of the ſtatute, to ſuch debts or deeds as are ſtrictly onerous, to which alone the heir *paſſing by* is ſubjected; and the court has alſo refuſed to extend the firſt clauſe of the act to the caſe where an apparent heir poſſeſſes the eſtate without making up any title; and theſe conſtructions of the ſtatute have been confirmed in the laſt reſort.

3*tio*, The conſequences of extending this penal clauſe would be extremely ſevere. If a ſon or a younger brother happens, by any accident, to be creditor to his father or elder brother, and does diligence againſt their lands, and enters into poſſeſſion for payment of his debt; this creditor, by extending the clauſe to poſſeſſion attained during the predeceſſor's life, would be ſubjected univerſally to the whole debts of his father or brother, not only ſuch as they have then contracted, but alſo what they may thereafter contract at any time in their life.——Further,

if

if a father, as is very common, happens to diſpone a part of his lands to his eldeſt ſon, when he comes to be of age, or when he enters into marriage; by ſuch conſtruction, if the father afterwards contracts debt, the ſon, by entering to poſſeſs, though during his father's life, would be ſubjected to an univerſal repreſentation, and liable for all ſuch debts.

4*to*, Suppoſing that *William Taylor* did incur a paſſive title by the purchaſe of theſe adjudications, or by poſſeſſing upon them after his father's death; yet this will not be a ground for reducing theſe adjudications, to the prejudice of the defender, his relict, a ſingular ſucceſſor, who muſt be preferred upon the adjudications, leaving the purſuer to inſiſt in a perſonal action againſt the repreſentatives of her huſband.

Replied, 1*mo*, If the words of the ſtatute are taken in a ſtrict gramatical ſenſe, they will no doubt apply only to an heir after his predeceſſor's death; but the expreſſion, in the common uſe of language, applies to the caſe of an heir, whether his predeceſſor be dead or alive; and the utmoſt accuracy of language is not to be looked for in the ſtatute 1695.

2*do*, Statutes relating to fraud, are intitled to the moſt liberal interpretation; and it is the duty of judges to explain them in ſuch a manner as to anſwer the intention of the legiſlature. This has been the practice in explaining other ſtatutes: Particularly, the court has, in many inſtances, given an extenſive interpretation to the ſtatute 1621, againſt unlawful alienations made by bankrupts. The ſtatute 1661, for obviating the frauds of apparent heirs, has been explained in the ſame extenſive manner. By that ſtatute it was ordained, that in caſe the apparent heir of any debtor, or any other confident perſon for his behoof, ſhould at any time thereafter acquire the right of an expired appriſing, the ſaid right ſhould be redeemable within ten years after it was acquired by the poſterior appriſers. The court has found, That, under the words *apparent heir* in this ſtatute, were comprehended *preſumptive heirs*. It has alſo been found, That the purchaſe of appriſings during the currency of the legal, fell under the intention of the act, though the words only mention *expired appriſings*; and the act has been extended ſo as to allow, not only poſterior appriſers to redeem, but alſo perſonal creditors. The ſtatutes 1661 and 1695 are extremely analogous; and therefore ought to be explained in the ſame manner. Both of them were intended to prevent the frauds practiſed by heirs; and the laſt act was only calculated to make the remedy more effectual. The ſtatute 1695 itſelf has been explained by the court in this extenſive manner, in two ſeveral caſes; 7th *June* 1710, *Watſon contra Brown*; and 24th *November* 1714, *Mercer contra Leith*, obſerved by *Dalrymple*; and the ſame ſtatute was extenſively interpreted by the court as to a different clauſe of it, in a late caſe, *Burns contra Dickens*, 4th *July* 1758.

3*tio*, The caſes of a ſon becoming debtor to his father, or of a father diſponing to his ſon upon occaſion of his marriage, do not apply. The ſtatute only relates to the acquiring diligences againſt the predeceſſor's eſtate, in order to carry it off to the prejudice of creditors; and it is moſt juſt, that heirs ſhould be prohibited from all traffick of this ſort, as well during the predeceſſor's life as after his death.

4*to*, The effect of the preſent reduction muſt be to ſet aſide the adjudications

judications in competition with the purſuer's title, becauſe the apparent heir, who became liable on a paſſive title by the purchaſe of theſe adjudications, could not have ſet them up in competition with the purſuer; and the defender is in effect only the gratuitous diſponee of the apparent heir, her huſband, by a poſtnuptial contract of marriage, containing exorbitant proviſions.

"The Lords repelled the reaſons of reduction; and aſſoilzied." W. J.

Act. Dav. Dalrymple, Lockhart. *Alt. Williamſon, Ferguſon.*

N° CXCIII. 25th *July* 1759.

JOHN FORBES-LEITH, and others, CREDITORS of *William Mowat and Company*,

AGAINST

ALEXANDER LIVINGSTON, and others, TRUSTEES for the creditors of the ſaid *William Mowat and Company*.

Diſpoſition by a bankrupt in favour of his whole creditors.

William Mowat and Company became bankrupt. In *December* 1756 they called a meeting of their creditors, at which *John Forbes-Leith* was preſent; at this meeting they made a full diſcovery of the whole ſtate of their affairs and funds; and agreed, at the deſire of the creditors, to make a general ſurrender of their whole effects to certain truſtees named and choſen by the creditors themſelves.

In conſequence of this agreement, proper deeds of conveyance were executed by the company; and infeftment was taken in name of the truſtees, for completing their right to ſuch of the company's ſubjects as were heritable. A backbond or declaration of truſt was executed by the truſtees, and recorded at *Aberdeen*, declaring, That the produce of the funds was to be divided amongſt the whole creditors proportionally.

John Forbes-Leith, and ſome others of the creditors, brought actions of adjudication for attaching the heritable ſubjects of the bankrupts.

The truſtees named by the creditors oppoſed theſe adjudications; for that, 1*mo*, Theſe diligences were intended to create an unequal preference in favour of particular creditors, contrary to the equitable intention of the truſt-right; and that, beſides, the adjudgers could not even attain their own end; for that all the other creditors, by adjudging within year and day, would be intitled to an equal preference with them; ſo that the only effect of carrying on this ſort of diligence would be, to involve every creditor in a great unneceſſary expence, ſo as to increaſe the loſs by this bankruptcy.

2*dly*, That, in point of law, the ſubjects could not be adjudged as the property of *Mowat and Company*, after the company was diveſted of them by the deed in favour of the truſtees, completed by infeftment: That theſe deeds being granted for a fair and equitable purpoſe, and for the behoof of the whole creditors, equally and proportionally, could not be ſet aſide by any particular creditor, but muſt effectually put a ſtop to

the attachment intended by the proceſſes of adjudication. At any rate, the right of the truſtees muſt be effectual till ſet aſide by a proper proceſs of reduction.

Anſwered. 1*ſt*, By the law of *Scotland*, a certain form of legal execution is eſtabliſhed, by which a creditor can attach the effects of his debtor. This form he is intitled to follow, and cannot be obſtructed, either by the debtor himſelf, or by other creditors, unleſs payment is offered. He is not obliged to explain his motives for following ſuch a courſe; nor ought the courts of law to liſten to averments, that he is acting againſt his real intereſt; for he is intitled to judge for himſelf. In this caſe, the creditors who have brought actions of adjudication, think they have good reaſons for diſapproving of the execution of the truſt-right in queſtion; and they have therefore choſen to follow the legal method of attaching their debtor's effects.

2*dly*, A bankrupt cannot, by the law of this country, execute any deed after his inſolvency, by which the rights of his creditors can be affected, or any reſtraint put upon them as to the form of attaching his effects. Diſpoſitions by bankrupts in favour of their whole creditors are authoriſed by no ſtatute; and if they were to be ſupported by the courts of law, it would give a power to bankrupts which might be attended with very bad conſequences: for theſe truſtees might connive with the bankrupt, and ſpin out the execution of the truſt for ages. Nor is any form of proceſs to be found in our law-books, for compelling ſuch truſtees to an immediate execution, or for removing them if they act improperly. Nor is the legal method of attaching the heritable ſubjects of a bankrupt either unequal or grievous: The law has taken ſufficient care, that no creditor can obtain a partial preference by adjudication, ſince all who adjudge within year and day of the firſt effectual adjudication have an equal right. The expence of carrying on ſuch judicial proceedings againſt the eſtate of a bankrupt, is no doubt conſiderable; but the execution of a truſt-right is alſo very expenſive; and if there be a difference of expence, which often is not the caſe, that difference is fully compenſated by the advantage of having every thing conducted under the immediate inſpection of the ſupreme court, and by the advantage which the creditors have, of bringing matters, if they incline, to a more certain, immediate, and fair execution. The right in queſtion, in favour of the truſtees, is void and null, and may be ſet aſide by exception or reply, without the neceſſity of a reduction.

"The Lords decerned in the adjudication; and remitted to the ſeve-
" ral Lord Ordinaries before whom other adjudications againſt
" the ſame defenders were depending, to decern therein." W. J.

Act. *Rae, Miller.* Alt. *Lockhart.* Clerk, *Juſtice.*

N° CXCIV.

N° CXCIV. 31ſt *July* 1759.

Captain ROBERT JOHNSTONE,

AGAINST

GEORGE Marquis of ANNANDALE, and his Tutor-in-law.

Clauſe of return in a vaſſal's charter, if good againſt a purchaſer for value?

UPon the 25th *January* 1596, Sir *James Johnſtone*, predeceſſor of the Marquis of *Annandale*, granted a feu-charter of the lands of *Willies*, to *James Johnſtone*, therein deſigned *his ſervant*, " et heredibus ſuis " maſculis de corpore ſuo legitime procreandis."

This charter bears, as its inductive cauſes, the improvement of the country by feuing, certain ſums of money advanced, and faithful ſervice done and to be done.

It contains the proviſo following: " Quod ſi defecerint heredes maſ- " culi procreandi de corpore præfati Jacobi legitimi, eo caſu dictæ ter- " ræ, cum pertinentiis, erunt, et revertentur, ad dictum Dominum Ja- " cobum, Militem, præfatis heredibus ſuis et aſſignatis manſuræ in " perpetuum."

The lands were poſſeſſed by *James Johnſtone* the vaſſal, and his deſcendents, in terms of this charter; and the inveſtiture was renewed by three ſeveral precepts of *Clare conſtat*, in which the clauſe of return was repeated.

Upon the 21ſt *September* 1709, *John Johnſtone*, who ſtood infeft upon a precept of *Clare conſtat* containing this clauſe, diſponed the lands of *Willies*, with conſent of *Sarah Baillie* his ſpouſe, to *Robert Johnſtone* of *Wamphray*; and at the ſame time diſponed the lands of *Stenrieſhill* in ſpecial warrandice, with abſolute warrandice both as to the principal and warrandice lands. The diſpoſition bears to be granted for a certain ſum of money, as the adequate value of the lands diſponed.

Captain *Robert Johnſtone*, the grandſon of *Robert Johnſtone* of *Wamphray*, the purchaſer, being ſerved heir *cum inventario* to his father and his elder brother, took out letters of horning, in terms of the late act of parliament, againſt the Marquis of *Annandale* and his tutor-in law, and charged them to grant him a charter in terms of the diſpoſition granted to his father by their vaſſal.

The Marquis and his tutor obtained a ſuſpenſion of this charge; and *pleaded*, 1*mo*, That by the clauſe of return, the vaſſal was laid under a limitation, and could not diſpone the lands in prejudice of the ſuperior's right.

2*do*, That ſuch a proviſo was certainly effectual to prevent gratuitous alienations; and there was no proof, in this caſe, that the diſpoſition to *Wamphray* was granted for value.

3*tio*, If there were ſuch proof, yet *Wamphray* was not *in bona fide* to make the purchaſe, when the vaſſal's rights appeared upon record to be limited.

4*to*,

4*to*, At any rate, if the ſuperior was at all bound to grant a charter to the diſponee, it ought to contain the proviſo in the charter 1596, by which the lands might return to the ſuperior, in caſe of the after failure of heirs-male of the vaſſal's body.

Anſwered, 1*mo*, A ſuperior is conſidered as abſolutely denuded of the property by a grant to a vaſſal, and the heirs-male of his body. The vaſſal, under ſuch a grant, can alienate at pleaſure; the right is deſcendible to his heirs-male collateral, and upon failure of heirs-male, the right will not return to the ſuperior, but will devolve to the crown as *ultimus heres*. The ſuperior's claim, therefore, in the preſent caſe, muſt depend entirely upon the clauſe of return, which can have no ſtronger effect in his favour, than it would have had between parties not ſtanding in the relation of ſuperior and vaſſal. In all ſuch caſes, if the clauſe of return was not inſerted for a valuable conſideration, it is defeaſible at pleaſure; and here the vaſſal appears to have paid a price for the feu, and muſt have agreed to this clauſe out of mere favour.

2*do*, If it had even been inſerted for a valuable conſideration, yet it could only bar gratuitous deeds; and here the ſale to *Wamphray* was made for full value: the conveyance to him mentions this; it is granted with conſent of the vaſſal's wife; it is granted with abſolute warrandice; and it diſpones other lands in real warrandice.

3*dly*, The clauſe contained in the vaſſal's right, could not occaſion any doubt or *mala fides* in the mind of the purchaſer; becauſe the import of the clauſe was only to prevent gratuitous alienations.

4*thly*, The ſuperior cannot inſert in Captain *Johnſtone*'s charter any proviſo, that the lands ſhall revert to him upon the failure of the heirs-male of the body of the former vaſſal; becauſe ſuch clauſe would be inconſiſtent with the right of the vaſſal to ſell the lands: a purchaſe of lands which was to continue only during the ſubſiſtence of the heirs-male of another family, would be no purchaſe at all. If a change of the vaſſal is at all admitted, the limitations which were perſonal to the vaſſal and his family, muſt, when that change happens, fly off.

"The Lords found, That the ſuſpenders were obliged to grant a "charter to the charger, and his heirs and aſſignees whatſoever; "and therefore repelled the reaſons of ſuſpenſion." W. J.

Act. *Ferguſon.* Alt. Sir *Da. Dalrymple.* Reporter, Lord *Colſton.*

N° CXCV. 3d *Auguſt* 1759.

DAVID SUTHERLAND of *Pronſie*,

AGAINST

GEORGE GRAHAM of *Drynie*.

An apparent heir cannot remove a tenant.

James Sutherland of *Pronſie*, after poſſeſſing the eſtate more than three years, died in apparency; and was ſucceeded by *David Sutherland*, who

who took poſſeſſion of the eſtate, without making up titles.

Iſabella Grant, the relict of *James*, continued her huſband's poſſeſſion of the lands of *Aberſcroſs*, which ſhe afterwards let in tack to *George Graham* of *Drynie*; and this tack was renewed to *Graham* by her ſecond huſband, Dr *Gordon*.

David Sutherland brought an action of removing againſt *Graham*, after his leaſe was expired; who *contended*, That an apparent heir, without infeftment, has no title to inſiſt in an action of removing.

Anſwered, The relict of *James Sutherland*, from whom the defender derived his poſſeſſion, had herſelf no right to poſſeſs, although ſhe had a perſonal obligation from her huſband for an annuity; for that any other perſon had as good a title to ſeize the vacant poſſeſſion as ſhe had. It will not be pretended, that the eſtate of an apparent heir is to belong to the firſt occupant. And if this were allowed, the illegal poſſeſſor, who takes hold of the lands which were in the natural poſſeſſion of the defunct, would not even be obliged to pay any rent.

Though the apparent heir cannot, without infeftment, remove thoſe who derive their poſſeſſion from the defunct; yet where there is no perſon deriving a right from the defunct, he may enter into the natural poſſeſſion himſelf; and as a neceſſary conſequence, he may remove thoſe who intrude themſelves into the poſſeſſion, without deriving right from the defunct. Where there are tenants, the apparent heir enters to the poſſeſſion of the rents: where there are no tenants, he has a right to the natural poſſeſſion of the ſubject, and he is intitled to vindicate this right by an action of removing.

"The Lords aſſoilzied from the action of removing." W. J.

Act. Burnett.

N° CXCVI. 8th *Auguſt* 1759.

WILLIAM SMITH CLERK of CHANCERY,

AGAINST

ROBERT KER, Eſq; DIRECTOR of CHANCERY, and JOHN RUSSEL, his DEPUTE.

Whether the director of chancery and his depute, or the clerk of chancery, has right to the cuſtody of the records?

IN the year 1722, Lord *Charles Ker*, and his ſon *Robert Ker*, were named directors of chancery during their joint lives, and for the lifetime of the ſurvivor.

In *July* 1732, *Robert Ker* granted a liferent-commiſſion to *William Smith* to be firſt or chief ſervant, writer, or clerk, under Mr *Ker* and his deputes, in the chancery-office, with a right to one half of the fees.

In *December* 1734, Mr *Smith* obtained a new liferent-commiſſion from *Robert Ker*, by which he was named ſole writer and clerk under the director and his deputes, with power to receive the whole fees of the office. This commiſſion was ratified by the crown, with a *Novo-*

damus in favour of Mr *Smith*; but by a backbond Mr *Smith* became bound to employ *John Irving*, or any other perſon to be named by the director, as one of his aſſiſtants in the office, and to allow him a certain proportion of the fees, upon his performing certain parts of the duty of the office.

In *September* 1758, Mr *Smith* had occaſion to go to the country, where he was afterwards detained by ſickneſs. He appointed *George Moncrieff* as an aſſiſtant to do the buſineſs of the office during his abſence, and afterwards granted him a formal commiſſion during pleaſure, to act as his principal ſervant in the office, to receive the fees, and to have the poſſeſſion and cuſtody of the repoſitories and records.

John Irving, the other aſſiſtant in the office, took poſſeſſion of the keys of the repoſitories which were intruſted to *George Moncrieff*, and refuſed to deliver them up to him; but, at the ſame time, he allowed *George Moncrieff* acceſs to the records during the office-hours.

Mr *Smith* complained to the ſheriff, and *inſiſted*, That the keys ſhould be reſtored to him, and the perſon he had appointed: but the director of the chancery, and his deputy, having given authority to *John Irving* to retain the cuſtody of the records, they were made parties to the proceſs before the ſheriff; and thereupon obtained an advocation of the cauſe.

It was *contended* for the director and his deputy, That they were the only perſons who had a right to keep the keys of the chancery-office: That this power was ſo naturally inherent in the office itſelf, that it ſeemed incongruous to ſuppoſe, that one could be director of an office, without having the cuſtody of its records; more eſpecially when in competition with a perſon who derived from the director all the connection he had with the office: That all writs paſſing the office are ſigned by the director and his deputy, and not by the clerk, who is only employed to copy theſe writings, and to record them in the books: and though, for conveniency, the records and warrants are uſually committed to the cuſtody of the ſervants; yet they have no right to keep them in competition with the director himſelf: That Mr *Smith* had, no doubt, a right to all the profits ariſing from his office of clerk, in ſo far as not reſtricted by his backbond; and the director can do nothing to hurt him with reſpect to theſe fees: but no injury of this kind is intended; for he is allowed full acceſs to the records by himſelf or his aſſiſtant, during the office-hours, when all the buſineſs is and ought to be tranſacted.

Anſwered, Mr *Smith* has always hitherto had the cuſtody and keeping of the records, which is a ſtrong evidence, that this was underſtood to be comprehended under the liferent-commiſſion granted to him. Mr *Smith* is appointed ſole clerk and writer in the office, with power to nominate his aſſiſtants, ſervants, and under-writers, for whom he is anſwerable; and he is even made anſwerable for *John Irving*, or any other to be appointed in his place, by Mr *Ker*; nor can he execute the duty of his office, if the records are taken out of his hands. In particular, he is bound to ſee that the regiſters be filled up with a good hand, and each writ recorded within a quarter of a year after its date; and he is intitled to the fees for ſearching and inſpecting the records. The office of director has now become a ſinecure. Every part of the buſineſs, except the ſigning the writs, is now devolved upon the clerk, though the director, it is believed, originally was himſelf the clerk;

clerk; and as the office of the clerk cannot be exerciſed without the poſſeſſion of the records, and that Mr *Smith* has a right to the office of clerk by virtue of a liferent-commiſſion, he muſt have a preferable right to the cuſtody of the records to the director himſelf.

" The Lords found, That Mr *Smith* has a right to hold the keys of " the office; and remitted the cauſe to the ſheriff." W. J.

Act. *Lockhart, Ferguſon.* Alt. *Kennedy.*

N° CXCVII. 10th *Auguſt* 1759.

JAMES MUIRHEAD writer,

AGAINST

JAMES CHALMERS merchant.

An obligation to diſpone lands, contained in a miſſive letter delivered to the buyer, is binding without any written acceptance.

James Muirhead agreed to ſell certain houſes to *James Chalmers*. The terms of the bargain were expreſſed in the following holograph letter wrote by him, and directed to *Chalmers*. " 26th *Auguſt* 1757. Sir, " I promiſe and oblige me, that *Thomas Anderſon* merchant in *Leith* " ſhall diſpone to you a tenement of land in the head of the *Canon-* " *gate, Edinburgh*, which formerly belonged to me, poſſeſſed by *James* " *Inglis* merchant in *Canongate*, and others; and that upon payment to " him of *L.* 190 *Sterling*, *L.* 100 *Sterling* whereof to be paid at *Mar-* " *tinmas* firſt to come, and *L.* 90 *Sterling* at *Candlemas* likewiſe firſt to " come; and that from and after *Whitſunday* laſt paſt, which is to be " your entry thereto, you having paid *L.* 1 *Sterling* of earneſt; and " the rights ſhall be made out at the ſight and pleaſure of Mr *Walter* " *Ferguſon* writer in *Edinburgh*, which I oblige me ſhall be done at or " before *Martinmas* firſt. I am, Sir, your moſt humble ſervant, " JAMES MUIRHEAD."——(Directed) *To Mr James Chalmers merchant in Leith.*

In *November* 1757, *James Muirhead* delivered the progreſs of writings to the purchaſer's agent, in order to make out a proper diſpoſition; and there was advanced to him by the purchaſer *L.* 50, for which he granted his bill.

The purchaſer, in the mean time, made ſome repairs on the houſes, and ſet to tenants ſome of them which fell vacant.

James Muirhead afterwards refuſed to fulfill the bargain; and *inſiſted*, That the miſſive letter was only an obligation upon one of the parties in this mutual contract; and that therefore there was *locus pœnitentiæ*, until the other party became bound, by a counter miſſive, which, in this caſe, never was executed: That he had ſold the tenement to *Anderſon* before his treaty with *Chalmers*; but that *Anderſon* had promiſed to rediſpone it: That *Anderſon* died before *Martinmas* 1757, and *Muirhead* could not obtain a rediſpoſition from his heirs: That, in every

mutual contract, if both parties are not bound, both muſt be equally free: That *Chalmers* was not bound by this letter: He might have put it in the fire, as *Muirhead* had no counter obligation to ſhow againſt him: If the ſubject had periſhed by fire, or any other accident, *Muirhead* could have had no action for the price: That this queſtion had been determined, 21ſt *March* 1634, Lady *Ednach*, obſerved by *Spottiſwoode*, where a contract between a ſingle perſon on the one ſide, and ſeveral parties on the other, being not ſubſcribed by all of them, was found not obligatory on the ſingle perſon; and, upon the 28th *January* 1663, *Montgomery*, it was found, that where a purchaſer, after a verbal tranſaction about lands, had wrote a letter to the ſeller, bearing, That he was not able to get the money agreed upon; but adding, "All I can now ſay is, "I am not to paſs from what was ſpoken betwixt you and me;" this did not bar the writer of the letter from reſiling, becauſe the other party could not be bound by barely receiving the letter; and both behoved to be bound, or neither.

Anſwered, The diſpoſition to *Anderſon* cannot prevent *Muirhead* from fulfilling his bargain, ſeeing that diſpoſition is ſtill in his own hands, and never was delivered to *Anderſon*; nor do his heirs make any claim upon it. —— There can be no doubt, that a perſon may bind himſelf by a holograph writing to diſpone lands to another at a certain price, and the other party becomes alſo bound by his acceptance of the obligation. The opinion of Lord *Stair* is expreſs, *book* 1. *tit.* 10. § 3. "An offer accepted is a contract, becauſe it is the deed of two, the "offerer and accepter." —— The ſame queſtion was determined in a late caſe, 23d *November* 1748, Lord *Kilkerran* againſt *Benjamin Paterſon*, where *Paterſon* had granted an obligatory holograph letter to his Lordſhip for the ſale of his lands, and afterwards wanted to reſile; but as it was admitted to have been delivered to Lord *Kilkerran* at the time of the agreement, the court found, That no *locus pœnitentiæ* was competent to *Paterſon*.

The caſes referred to do not apply. In that obſerved by *Spottiſwoode*, in 1634, the bargain was executed by a mutual contract, and ſome of the contracters had not ſubſcribed; by which, of conſequence, the contract was incomplete: and in the other, in 1663, the letter was neither conceived in proper obligatory terms, nor could the other party be conſidered as having accepted of it, by barely receiving it as a common letter. In the preſent caſe, not only is the letter conceived in proper terms, but it was delivered and accepted in conſequence of the bargain. *Muirhead*, the ſeller, afterwards delivered the progreſs of writings to the purchaſer's agent, and received part of the price upon his bill; and the purchaſer, on the other hand, entered to the poſſeſſion of the houſes, laid out money upon them, and let ſome of them to tenants.

The Lord Ordinary repelled the defences; and found *Muirhead* obliged to fulfill the bargain.

"The Lords adhered." W. J.

Act. *Ferguſon.* Alt. *Garden.*

N° CXCVIII.

N° CXCVIII. 17th *November* 1759.

PATRICK YEAMAN of *Blacklaw*,

AGAINST

GEORGE DUNBAR, and other heritors and tenants of the lands of *Grange*.

1. *The indefinite aſtriction of lands to a mill by the proprietor of both, imports the thirlage of* omnia grana creſcentia. 2. *Clauſe* cum molendinis *in the* Tenendas, *without poſſeſſion of immunity, does not diſcharge an aſtriction.*

THE lands of *Grange* and *Blacklaw* anciently belonged to the abbacy of *Cupar*, and were aſtricted to the mill of *Blacklaw*, as were all the other lands of the abbacy to that and other mills belonging to it.

Various acts were made in the court of the abbacy before the 1562, reſpecting the thirlage of the abbacy-lands in general; by ſome of which the tenants were made liable in dry multure for their corns which they diſpoſed of without grinding, and even obliged to pay a ſmaller multure for the corns they brought in to the lordſhip.

In 1559, the lands and mill of *Blacklaw* were feued out by the abbot and convent to *John Drummond* of *Colquhillie*. The deſcription in the diſpoſitive clauſe of the charter is this: "Totas et integras terras noſtras de Blacklaw, Cotyards Eaſter et Weſter, cum ſuis pertinen. nec non molendinum noſtrum de Blacklaw, cum terris molendinariis, *multuris ſiccis et liberis*, lie *ring bear*, ac omnibus aliis pertinentiis, proficuis, cuſtumis, et libertatibus, dicto molendino ſpectan. *ſeu de more vel conſuetudine terrarum noſtrarum ſpectare deben.* jacen. infra terras ſeu dominium noſtrum de Cupro, et vicecomitatum de Perth." But in the precept of ſeiſin, the deſcription is in theſe words: "Totas et integras terras noſtras de Blacklaw, una cum molendino ejuſdem, terriſque molendinariis, *multuris aſtrictis*, *liberis*, *et ſiccis*, *omnium et ſingularum terrarum noſtrarum* ſupra aquis de Yliff et Arichyt."

The property of the lands and mill of *Blacklaw* came by progreſs from *Drummond* to *Patrick Yeaman*; and the lands of *Grange* were acquired by *George Dunbar* and others; two of whom, *John Gellatly* and *William Chalmers*, derived right to their ſhares thereof from the Earl of *Athol* by charters, which in the *Tenendas* deſcribed the lands as granted *cum molendinis*, *multuris*, *et eorum ſequelis*.

Patrick Yeaman brought a proceſs againſt the heritors and tenants of *Grange*, for having it found, that their lands were aſtricted to his mill of *Blacklaw*, both as to their *omnia grana creſcentia*, and the *invecta et illata*, and for payment of abſtracted multures.

Pleaded for all the defenders except *Gellatly* and *Chalmers*, That they acknowledged the aſtriction; but that it only extended to ſuch of their growing corns as they had occaſion to grind, and not to their other

corns which they had occaſion to ſell, far leſs to the *invecta et illata*. The aſtriction ſpecified in the feu-charter of the mill being only general, without mention of *grana creſcentia*, or *invecta et illata*, muſt be taken in the conſtruction eaſieſt for the inhabitants of the ſucken; as thirlage, like other ſervitudes, being conſidered in law as unfavourable, cannot be extended by implication. The old acts of the baron-court of *Cupar* are not authenticated, only a copy being produced. But ſuppoſing them genuine, theſe acts are only ſo many veſtiges of the tyranny of the Popiſh clergy; and however rigorous, do not expreſsly declare the whole growing corns to be aſtricted: and the obliging the people to bring the *invecta et illata*, muſt have been an illegal exaction, ſince the acts only require them to pay outſucken multure for the ſame, inſtead of the higheſt multure, as uſual; and all theſe old acts are entirely in deſuetude, and cut off by preſcription. Further, as the charter of the mill grants the multure *de more vel conſuetudine*, uſe and wont muſt be underſtood to be the *modus* of the aſtriction, agreeable to the opinion of *Craig*, *lib.* 2. *d.* 8. § 7.; and Lord *Stair*, *book* 2. *tit.* 7. § 18.; and from the evidence of witneſſes, it appears, that the tenants of *Grange* have been in uſe to ſell part of their corns, and only to pay multure for what they grinded.

Anſwered for the purſuer, Where a proprietor aſtricts his lands to a mill indefinitely, he is underſtood to aſtrict the whole growth of the lands, and not merely ſuch part thereof as may be conſumed by the inhabitants; *Stair*, title, *Servitudes real*, § 18.; Sir *George Mackenzie*, title, *Servitudes*, § 24.; and 26th *June* 1635, *Waughton contra Home*. This holds more eſpecially, where a proprietor aſtricts his own lands to his own mill; for it being the ſame thing to him, whether the tenants pay that part of their victual-rent to himſelf, or to the tackſman of his mill, the preſumption lies, that he would naturally chuſe the aſtriction of *grana creſcentia*, as what is leaſt liable to be defrauded by abſtractions. Accordingly, here the ancient acts of the abbacy-courts ſhow, that in thoſe days the tenants were obliged to pay the multure of all their growing corns to the mill, as well as to pay free multure for the *invecta*; which cannot be called oppreſſive, as the abbey could not have any inducement to oppreſs their own tenants of the lands in favour of their tenant in the mill; and their taking a leſſer multure for the *invecta*, proves no oppreſſion was intended. But excluſive of the acts, the clauſe in the original feu-right of the mill ſufficiently explains and eſtabliſhes the thirlage in the ſame ſenſe. The grant of the *aſtricted multures* of the *whole lands*, ſhows the whole growing corns were aſtricted; the *free multures* ſhow, that where the inhabitants purchaſed corn elſewhere, they were bound to bring them to be manufactured at the mill; and the *dry multure* refers to ſuch as ſhould be paid for grain ſold and exported out of the thirl. Theſe words, therefore, leave nothing to be ſettled by uſe or cuſtom; and it appears from the proof, that the practice of ſelling part of the growing corns, without paying multure, had only crept in of later years, far within preſcription; and conſequently was only an illegal abſtraction, which is now complained of.

Pleaded, *ſeparatim*, for *Gellatly* and *Chalmers*, It is *triti juris*, that a conveyance of lands, with mills, multures, and ſequels, liberates from an aſtriction; as appears from Lord *Stair* and other writers, and from

ſundry

ſundry deciſions, obſerved by *Harcarſe*, *voce Multures*; another deciſion, 17th *January* 1682, *Burton*, obſerved by *Dirleton*; and a later caſe in 1723, *Ruſſel contra Waddell*. The defenders charter from the Earl of *Athol*, ſo far back as the 1589, bearing ſuch a clauſe, muſt therefore import a diſcharge of their aſtriction.

Anſwered for the purſuer, *1ſt*, The clauſe, *cum molendinis*, in the *Tenendas*, even of a charter from a ſubject-ſuperior, who remains proprietor of the mill, is not underſtood to diſcharge an aſtriction formerly eſtabliſhed, unleſs ſo explained by poſſeſſion, as theſe words are frequently thrown into that clauſe with other words of ſtyle, *per incuriam*; *Stair*, title *Servitudes real*, § 24. The deciſions cited by the defenders were given in caſes where the clauſe was explained by poſſeſſion; but, in the preſent caſe, the defenders and their predeceſſors, having conſtantly acquieſced in the aſtriction ſince their charters, cannot claim immunity thereupon; agreeable to a late deciſion in 1738, between the Duke of *Douglas* and *Baillie* of *Begbie*, where a clauſe in the *Tenendas* of *Begbie*'s charter from the Duke's predeceſſor, *cum molendinis*, and a ſpecial *Reddendo*, *pro omni alio onere*, were not found ſufficient to diſcharge the aſtriction, as *Begbie*'s tenants had ſtill continued to grind their corns at the Duke's mill, and pay inſucken-multures. And, 2*do*, The Earl of *Athol* had no power to diſcharge this aſtriction, had he declared it ever ſo expreſsly. It does not appear, that he ever was ſuperior of the lands of *Grange*; and any right he pretended to thoſe lands was reduced at the inſtance of Lord *Cupar*. At any rate, as he never had nor pretended a right to the mill of *Blacklaw*, the aſtriction eſtabliſhed in favour of *John Drummond*, the proprietor of that mill, in 1559, could not be impaired by any charter of other ſubjects granted by the Earl in 1589.

"The Lords found, That all the *grana creſcentia* are thirled; but that "there is no evidence, that the *invecta et illata* are thirled: and "found, That the charter from the Earl of *Athol* does not exeem "*Gellatly* and *Chalmers*." D. R.

Act. *Ferguſon*, Alt. *And. Pringle*, *Lockhart*. Reporter, *Woodhall*. Clerk, *Gibſon*.

N° CXCIX. 21ſt *November* 1759.

WILLIAM ANDREW ſhipmaſter in *Crawfordſdike*,

AGAINST

ANDREW SYME *and Company*, merchants in *Glaſgow*.

A bill payable certain days after ſight, need not be tranſmitted by poſt for acceptance and payment.

MEſſ. *Syme and Company*, on the 5th of *May* 1755, drew a bill on *John* and *Robert Dunlops* in *Rotterdam*, for 600 guilders, payable at twenty-one days ſight, to *Thomas Hopekirk* or order. This bill was indorſed by *Hopekirk* to *William Andrew*.

Upon *Andrew*'s arrival in *Holland*, the bill was indorſed by him, and paſſed

paſſed through ſeveral hands, till it was at laſt preſented and accepted by the *Dunlops* about the 20th of *June*.

At the time of making this draught, the *Dunlops* were indebted to *Syme and Company* in a greater ſum; but the *Dunlops* affairs having gone into diſorder about the beginning of *July* 1755, the bill was proteſted for not payment on the 16th of that month; and *Andrew inſiſted* in a proceſs for recourſe againſt *Syme and Company*, the original drawers.

Objected for the defenders, The bill might and ought to have been preſented to the *Dunlops* for acceptance much ſooner than it was; and if the porteur delayed to ſend the bill by poſt, or chuſed to wait ſo long that the accepters failed in the *interim* before payment could be recovered, the loſs muſt fall upon the porteur, and not on the drawer.

Anſwered for the purſuer, That he got this bill as he was going to ſail for *Holland*, and reſolved to carry it with him for ſaving commiſſion and agent fee. As ſoon as he arrived in *Holland*, he ſent it to *Rotterdam*, where it was preſented without any great delay. Where bills are drawn on ſight, the porteurs have a diſcretionary power to fix the period when they ſhall become payable, ſooner or later, as their exigencies ſhall require, unleſs they are guilty of a *lata culpa*. The delay of preſenting is rather a favour to the drawer, as till that time it cannot be put to the drawer's debit. Accordingly it has been found, that bills drawn on ſight did not require the ſame rigorous negotiation with bills payable on a day certain, 7th *February* 1735, *Gordon contra Innes*.

Replied, The defenders had no dealings with the purſuer, nor any reaſon to doubt that the bill was to be tranſmitted in courſe of poſt, otherwiſe they would have choſen a more certain way of drawing their money from *Holland*. The caſe muſt be determined therefore on the general rules of law, drawn from the nature of the contract *Mandati*, *l.* 13. *C. Mandati*. There is no other difference between bills drawn on ſo many days ſight and thoſe at a fixed day, than what ariſes from the nature of the thing, which, as to the former, muſt occaſion a little uncertainty even when ſent by poſt. But ſtill it is incumbent on the porteur to tranſmit the bill with all convenient ſpeed, that the mandate may receive its final completion. When the porteur ſtudies his own conveniency, or is uncertain of his arrival, he takes letters of credit, and not bills on ſight. The reaſon why the drawer ſuperſedes payment for ſome days after preſenting, is for the conveniency of his correſpondent. It is contrary to the principles of ſuch a contract, to ſuppoſe any favour to the drawer in delaying the negociation of this bill, which implies a reciprocal obligation on the drawer, to warrant the ſolvency of the perſon on whom it is drawn, and upon the porteur to uſe all reaſonable diligence; *Bankton*, *vol.* 1. *p.* 359. § 7.; *Erſkine*, *p.* 285. § 15. In the caſe of *Gordon contra Innes*, the difference of time was only *four days*, had the bills been ſent by poſt; and the caſe was nevertheleſs ſo doubtful, that the parties agreed it, without waiting a ſecond interlocutor.

" The Lords repelled the defence, That the bill was not duly preſent-
" ed for acceptance." D. R.

Act. *Lockhart*. Alt. *Rae, Ferguſon*. Reporter, *Bankton*. Clerk, *Home*.

N° CC.

N° CC. 21ſt *November* 1759.

JANET MITCHELL, relict of *James Kay* of *Edinbelly*,

AGAINST

THOMAS WRIGHT of *Eaſter Glen*.

A donation mortis cauſa, *of a ſum of money exceeding* L. 100 Scots, *is effectual without writ, and may be proved by a quality of the party's oath.*

John Wright, by a ſettlement made three years before his death, conveyed to *Jean Kay*, his ſpouſe, all debts and effects that ſhould belong to him at his deceaſe.

Jean Kay ſurvived her huſband a ſhort time; and by her teſtament appointed her mother *Janet Mitchell* her executor; who was afterwards confirmed executrix-dative *qua* creditor to the ſaid *John Wright*, in implement of his general diſpoſition to his wife.

Upon this title *Janet Mitchell* brought an action before the ſheriff of *Stirling* againſt *John Wright*, the father of the ſaid deceaſed *John Wright*, for payment of 1000 merks, ſaid to have been put into his hands by young *John* a few days before his death.

The libel being referred to the defender's oath, he deponed, "That "four or five days prior to the death of *John Wright*, the deponent's "ſecond ſon, the ſaid defunct being then on his deathbed, gave to the "deponent 1000 merks *Scots*, to be delivered to *Margaret* and *Mary* "*Wrights*, the deponent's daughters, equally betwixt them, by way "of gift; and which the deponent accordingly delivered to them about "ſix months after the defunct's death; and which ſum was delivered "to the defunct by *Jean Kay*, then the defunct's ſpouſe: That if the "defunct had lived any conſiderable time after, he would have return-"ed the money to him, as the defunct deſired the deponent not to de-"liver it till after his death."

Upon adviſing this oath, the ſheriff "found, That the defender's ſon, "by his nuncupative teſtament, could only by law leave *L.* 100 *Scots* "to each of his ſiſters, and reſtricted the ſum left to them according-"ly; and found the defender liable for the balance."

John Wright obtained a ſuſpenſion; and afterwards dying, the proceſs was carried on by *Janet Mitchell* againſt his ſon and repreſentative *Thomas Wright*.

Pleaded for the charger, That it appears from *John Wright*'s oath, he was deſired by his ſon not to deliver the money to his ſiſters till after his death; and that if his ſon had lived any conſiderable time after, he would have returned it to him: which proves, that the property of the money was not transferred during the lifetime of *John Wright* the ſon: That therefore it can be conſidered in no other light than that of a legacy or donation *mortis cauſa*; and as writing, by the law of *Scotland*, is eſſential to the conſtitution of a legacy of a greater extent than

L. 100 *Scots*, this verbal legacy to each of the ſiſters cannot be ſuſtained beyond that ſum.

Pleaded for the ſuſpender, 1*mo*, This was not properly a legacy, but rather a gift or donation *inter vivos*, as the money was given away by the donor in his own lifetime, and the father or ſiſters were under no legal obligation to return it. 2*do*, Suppoſing it to have been a legacy, yet it muſt ſubſiſt without writ, though beyond *L.* 100: for although a nuncupative legacy of a ſum beyond that amount cannot be ſuſtained, *propter lubricam fidem teſtium*; yet it is thought, a legacy of a ſpecific debt or ſubject to a greater extent may be conſtituted and proved otherwiſe than by writ, *Dirleton* and *Stewart*, voce *Legacies*. And further, in this caſe, the proof does not reſt upon the bare emiſſion of words, but is eſtabliſhed and made effectual by delivery of the money. 3*tio*, The quality of *John Wright*'s oath, That the money was given him to be delivered to his daughters, is intrinſic. The only mean of proof for eſtabliſhing the charger's claim, was his oath for inſtructing that the money was put into his hands; ſo it cannot be divided, but muſt alſo prove the ends and purpoſes for which the money was depoſited.

Anſwered for the charger, The quality of the oath can have no greater effect, than if the father had been *ab ante* cuſtodier of the money, or debtor to his ſon for any other cauſe; and it would be dangerous, if every cuſtodier or debtor had it in his power to give away the defunct's effects to a third party, to the greateſt extent, by ſwearing to a verbal order or legacy. Again, the mere act of delivery imports no tranſmiſſion, without legal evidence of the will or intention of the teſtator; and that cannot be legally expreſſed or proved but by writing. Suppoſing, therefore, the fact were true, that the defunct gave his father ſuch an order, to deliver the money to his ſiſters; yet that deſtination being only appointed to take effect after his death, was truly a legacy, to the conſtitution of which, of whatever kind, beyond the value of *L.* 100 *Scots*, writing is required, not only as the mean of proof, but as an eſſential ſolemnity, equally as in the nomination of an executor, the appointment of tutors and curators, or the conveyance of heritage; 19th *January* 1665, *Schaw contra Lewens*; *Bankton*, *vol.* 2. *p.* 378.

Replied, There can be no danger in admitting ſuch a quality as an intrinſic part of the oath, when the debt can only be conſtituted againſt the party by his oath. If the party has no regard to an oath, he might as eaſily ſwear away the debt altogether, and of which there would be a much greater riſk, than of his ſwearing falſely in favour of a third party.

Obſerved on the bench, 1*mo*, This is not a legacy, but a gift or donation *mortis cauſa*, which differs from a legacy, in ſo far as it is done *de præſenti*, though the effect of it is ſuſpended till the donor's death. Upon this diſtinction, it is now underſtood, (though it was not ſo anciently), that a man may effectually convey his heritage in his teſtament, reſerving his liferent, and a power to alter, providing he uſes the *verba de præſenti*, ſuch as *give*, *grant*, or *diſpoſe*, and not *legate* or *bequeath*. The rule as to writ being eſſential to legacies, therefore, does not apply to this caſe, in reſpect of the delivery of the money, which was the ſame as if it had been made to the ſiſters themſelves, and was a deed *inter vivos*, though only *mortis cauſa*. 2*do*, The quali-

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ty of the oath is intrinſic. It is laid in the libel, that a certain ſum belonged to the defunct at his death, and was put in the defender's poſſeſſion; the mean of proof is the defender's oath, and his oath does not prove, that the money belonged to the defunct at the time of his death.

"The Lords ſuſtained the reaſons of ſuſpenſion, and ſuſpended the "letters *ſimpliciter*." D. R.

Act. *Miller.* Alt. *Macqueen.* Reporter, *Strichen.* Clerk, *Gibſon.*

N° CCI. 7th *December* 1759.

MARION WILSON,

AGAINST

ALEXANDER FALCONER.

Office of truſt granted during life, with power to name a deputy, cannot be adjudged.

Alexander Falconer, keeper of the regiſter of ſeiſins for the ſhire of *Berwick*, in which office he had a power to name a deputy, being debtor to the purſuer, ſhe raiſed an action of adjudication of this office.

Pleaded for *Falconer*, The office is not adjudgeable; becauſe it is not a patrimonial eſtate. The defender has only his commiſſion during life, or ſo long as he executes the office properly; it does not go to heirs; and it cannot be aſſigned: but an adjudication is a legal aſſignation.

In the nomination of a perſon to this office, there is a *dilectus perſonæ*. Diligence and fidelity are requiſite in the execution of it, for which there can be no ſecurity, if it may be attached indiſcriminately by any creditor of the officer. The crown has inveſted him with certain powers. His regiſter, and extracts from it, bear faith in all courts. Theſe powers he may commit to a deputy; but no court has a power to transfer them to creditors. Some few inſtances may indeed be given, where offices of truſt have been adjudged; ſuch as that of ſheriff, uſher, and printer to the King, *&c.* But the principles on which theſe deciſions were founded, are not void of difficulty. Beſides, theſe were caſes very different from the preſent. In each of them there was an heritable patrimonial intereſt; they paſſed by charter and ſeiſin, as land-rights do, or deſcended to heirs. They were granted in perpetuity, or for a certain term of years; and might be aſſigned, bought, and ſold, without the approbation or acceſſion of the crown, as any other thing in property may. But this office is of uncertain duration; it is granted for life, or *quamdiu ſe bene geſſerit*; it cannot be transferred from one perſon to another, without a new commiſſion from the crown; and it is not in any ſhape given by the crown as a patrimonial eſtate or property.

Pleaded for the purſuer, That in law and reaſon every perſon's eſtate,

ſtate, whether heritable or moveable, whether in liferent or fee, whether it is an eſtate veſted for a long or a ſhort endurance, ought to be ſubjected to the diligence of his creditors. It is admitted, that many heritable offices of truſt, in which a *dilectus perſonæ* was proper in a very high degree, and which were veſted by the crown with great powers, and a public character, ſuch as thoſe of Conſtable, Juſticiar, Chamberlain, Sheriff, Steward, Mayor, Bailie, Foreſter, Coroner, King's Uſher, and King's Printer, have been ſo far conſidered as property, that they have been adjudged; and as ſuch offices have been adjudged, when granted heritably, or for a term of years, a good reaſon does not occur, why they might not have been adjudged had they been granted only for life.

There is no difference in the nature of the thing betwixt an heritable office, and an office for life, except in the endurance. The terms of the grant, in other reſpects, are the ſame, the duties of the offices are the ſame. A prohibition to alienate is not more implied in the one than in the other; and an heritable office is not more the property of the poſſeſſor than a liferent one is, for the terms of their reſpective endurance. It appears then incongruous, that the one ſhould have it in his power to with-hold his eſtate from his creditors, and that the other ſhould not have the ſame power. In other ſubjects, this diſtinction is not obſerved; a terce, a courteſy, the liferent of an heir of entail, or any other liferent of a land-eſtate, may be adjudged as well as the fee of it. Suppoſe the liferent of an office is granted to a man, and the fee of it to his ſon, it will not be diſputed, that the liferent of this office would be adjudgeable for the debt of the father, as his property. By parity of reaſon, the liferent of an office ought to be ſubjected to the diligence of creditors, although the fee of it is not given away, but remains in the crown.

Every objection ariſing from the importance of this office, from the *dilectus perſonæ*, the care and diligence requiſite in executing it, and the powers veſted in the officer by the crown, ought to have applied with more weight againſt the adjudication of the high heritable juriſdictions already mentioned. Beſides, the nice choice of a perſon to officiate in this office is not neceſſary, it requires only a faithful tranſcriber. The defender, by his commiſſion, is impowered to name any perſon he pleaſes to be his deputy; and the creditors may be as capable to officiate, or to appoint a proper deputy, as the officer himſelf. By act 6. parl. 1424, it is provided, That where officers of the law are incapable, others may be appointed in their places; but what greater incapacity can there be than bankruptcy? and who are ſo well intitled to enjoy the office during the incapacity as the creditors of ſuch officer?—— This queſtion has been formerly determined in the court of ſeſſion. The creditors of *Hugh Crawford*, keeper of the regiſter of ſeiſins for the ſhire of *Renfrew*, led ſeveral adjudications of his office from the 1750 to 1753.

Replied, The argument founded on the act of *James* I. does not apply. The power granted of naming perſons to officiate during the incapacity of officers of the law, or other officers, was only in the caſe of heritable offices, of which the poſſeſſor, though minor, or otherwiſe incapable, could not be deprived. But this is an office *ad vitam aut culpam*. If the officer is incapable of officiating, he may be deprived. The adjudications led againſt *Hugh Crawford* were pronounced by the

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Lord Ordinary in the outer houſe, and no appearance was made for *Crawford* the debtor.

" The Lords found the office not adjudgeable." I. C.

Act. *J. Dalrymple.* Alt. *P. Murray.*

N° CCII. 8th *December* 1759.

Sir WILLIAM MONCRIEFF,

AGAINST

The CREDITORS of Sir *Thomas Moncrieff.*

Right of the heir of a marriage to challenge deeds contrary to the marriage-contract, without a ſervice.

BY contract of marriage in the 1701, betwixt *Thomas Moncrieff*, afterwards Sir *Thomas*, and *Margaret Smith* his wife, the two eſtates of *Moncrieff* and *Fordell*, and 100,000 merks more, were provided by his uncle Sir *Thomas Moncrieff* to the ſaid *Thomas*, *and the heirs of the marriage.*

Sir *Thomas*, the nephew, ſucceeded to theſe eſtates; but it does not appear, that any part of the 100,000 merks was paid to him. He ſold the eſtate of *Fordell*, and bought certain other lands, *viz. Boghall*, *Craigie*, and *Magdalens.*

This Sir *Thomas* the Second, being diſſatisfied with the conduct and marriage of his eldeſt ſon *Thomas*, made exorbitant proviſions, over and above thoſe contained in his contract of marriage, to his wife, and to his younger children; particularly, he diſponed to his ſecond ſon, *David*, the lands of *Boghall*, *Craigie*, and *Magdalens*, *&c.*; and he died in 1739.

His ſon Sir *Thomas* the Third expeded a general ſervice as heir male and of proviſion, in terms of the contract of marriage, to his father; and raiſed an action of reduction of theſe exorbitant proviſions.

By deſtination he ſucceeded to the eſtate of his uncle *David Moncrieff*, in *Jamaica*; and veſted it in truſtees, for the behoof of his creditors, himſelf, and his two ſons, *William* and *Patrick.*

A few months after his father's death, Sir *Thomas* the Third died, in 1739, without making up titles to the eſtate of *Moncrieff.*

Sir *William*, his ſon, during his pupillarity, was ſerved heir in general to his father; and his tutors, who were the ſame perſons who had been appointed truſtees to the *Jamaica* eſtate, granted a factory to certain perſons reſiding there to manage it.

Sir *William* inſiſted, for ſome time, in the reduction raiſed by his father, of the exorbitant proviſions made by his grandfather to his younger children, to the prejudice of the heir of the marriage; but after his majority, for certain valuable conſiderations, he ratified and confirmed theſe proviſions.

Thereafter, within the *quadriennium utile*, he raiſed a reduction of his

general ſervice, on theſe grounds, That it was unneceſſary, and to his leſion.

It was unneceſſary, becauſe the only ſubjects he could have right to, as heir of the marriage, were the eſtates of *Moncrieff* and *Fordell*, and the 100,000 merks, or the right of action for implement of theſe proviſions, contained in the contract of marriage, in ſo far as it had not been fulfilled. The land-eſtates of *Moncrieff* and *Fordell* could not be carried by a general ſervice: and he ſucceeded to the firſt of theſe as heir to his grandfather, paſſing by his father, who was neither infeft nor three years in poſſeſſion: the other eſtate (that of *Fordell)* was ſold by Sir *Thomas* the Second, who had powers to ſell it; and ſuppoſing the price of it had been *in medio*, it could not be carried by this ſervice; it would have gone by confirmation to the executors of Sir *Thomas* the Second, not to the heir: and the 100,000 merks could not be carried by it, as this ſubject did not exiſt. So that the only right he could be ſuppoſed to acquire by this ſervice, was the right of action for implement of the contract of marriage, of which he was the heir, and to reduce deeds done in contravention thereof: but this right of reduction he had without being ſerved heir; he, as heir of the marriage, being creditor on the contract, might inſiſt in that reduction, without being ſerved; his ſervice, therefore, was quite unneceſſary and inept.

It was to his leſion, as it ſubjected him univerſally to his father's debts, to which he was not otherwiſe liable, as he did not repreſent him.

His father's creditors *objected* to this reduction, 1*mo*, That the ſervice was proper and neceſſary to intitle Sir *William* to inſiſt in the action commenced by his father, for reducing the gratuitous deeds granted by Sir *Thomas* the Second to his lady and younger children.

By the law of *Scotland*, a ſervice is neceſſary, both to aſcertain the propinquity of the heir, and to tranſmit to him the heritable ſubjects of the defunct, whether it be a right to a certain ſubject, or a right of action. And this holds with regard to the heirs of proviſion by a contract of marriage, as well as to other heirs. So it was found in the caſe of *Hay* of *Drummelzier* againſt the Earl of *Tweeddale*, 21ſt *July* 1676. In conſequence of this poſition, Sir *Thomas* the Third was rightly ſerved heir in general to Sir *Thomas* the Second; and on this title he raiſed the action of reduction of the gratuitous deeds executed by Sir *Thomas* the Second, to the prejudice of him the heir of the marriage.

If Sir *Thomas* the Third had not expeded any ſuch ſervice, his ſon Sir *William* was equally obliged, as heir of the marriage, to ſerve himſelf heir, in order to intitle him to enjoy the ſubjects deſcending to the heir of the marriage, or to challenge deeds done in contravention of the contract of marriage; but after theſe ſubjects were properly veſted in Sir *Thomas* the Third by his general ſervice, it became abſolutely neceſſary for his ſon Sir *William*, to ſerve heir to him, in order to tranſmit them from his father to him, although it ſhould be admitted, that had Sir *Thomas* the Third not been ſerved, Sir *William*, as creditor by the contract of marriage, might have taken them up without a ſervice; for they being once veſted in the perſon of Sir *Thomas* the Third, they could not be tranſmitted to his heir without a ſervice.

Anſwered, The intention of a ſervice is *to enjoy* the rights veſted in the

the predeceſſor, not *to challenge* deeds done by him. The only purpoſe of either Sir *Thomas* the Third's ſervice, or Sir *William*'s, was to challenge the deeds granted by Sir *Thomas* the Second; for there remained no other rights to be carried by this ſervice: and for this purpoſe a ſervice was quite unneceſſary; for the heir of the marriage was creditor to the contracting parties. As creditor, he was intitled to inſiſt for implement of the proviſions in the contract, without a ſervice, and to challenge, by reduction, deeds done to his prejudice. Such proceſſes have been often ſuſtained to the children of a marriage without a ſervice; *January* 13. 1665, *Wallace contra Wallace*, obſerved by *Gilmour*; *December* 15. 1681, Sir *William Binning contra* Sir *William Maxwell*; and, *July* 28. 1688, *Chalmers contra Chalmers*; both obſerved by *Harcarſe*, *tit. Contracts of marriage*; *December* 7. 1697, *Cuming contra Kennedy*; *February* 3. 1732, *Campbell contra Duncan*, both obſerved in the Dictionary, vol. 2. p. 279. 280. The deciſion of *Drummelzier* can be of little authority, as it proceeded on the conceſſion of a party, *Drummelzier* having offered *to produce a ſervice and retour cum proceſſu*.

The granter of theſe gratuitous deeds was debtor to his ſon Sir *Thomas* the Third and to Sir *William*, as heirs ſucceſſively in the proviſions of the contract of marriage. That the creditor ſhould ſerve heir to his debtor is unneceſſary; it was therefore improper in Sir *Thomas* the Third or Sir *William*, to expede any ſervice, in order to intitle them to carry on the reduction of the deeds granted by Sir *Thomas* the Second, in prejudice of the heir of the marriage.

Objected, 2*do*, *Res not ſunt integræ*. Sir *William*, after being ſerved heir in general to his father, and after his majority, diſcharged the action of reduction of the gratuitous deeds of his grandfather, and ratified and confirmed the ſaid deeds. By this act of Sir *William*'s, the creditors of his father are prejudiced. The right of reduction was competent to them; this right he has diſcharged, and he cannot now reſtore it to the creditors.

Anſwered, At the time of granting this confirmation and ratification, Sir *William* had two rights in him; the right of creditor, as heir of the marriage; 2*dly*, the improper one, as being ſerved heir to his father. In granting the ratification, he exerciſed the firſt, not the ſecond. This appears from the deed of ratification, in no part of which is his ſervice mentioned or founded on. Beſides, theſe creditors are not thereby prejudiced: he only diſcharged his own right to reduce, not his father's; if they, as his father's creditors, have any title to reduce theſe gratuitous deeds, it is ſtill competent to them.

Objected, 3*tio*, That Sir *William* is not leſed by this ſervice. By the ſucceſſion through his father to the *Jamaica* eſtate, he is greatly benefited more than to the extent of the debts due to theſe creditors.

Anſwered, The *Jamaica* eſtate is not within the territory of the judges of this country, and cannot be carried by ſervice before them. 2*dly*, It was veſted in truſtees. Sir *William*'s father was diveſted of it, and it could not be carried by a ſervice to him. 3*dly*, Sir *William* has not received any thing out of that eſtate. It was veſted in truſtees for the benefit of theſe creditors, the defenders, and for certain other purpoſes: he has not been benefited by his ſucceſſion to it, or any other ſubject deſcending through his father.

The

The Lord *Kames* Ordinary, found, " That the late Sir *Thomas Mon-*
" *crieff*, to whom the eſtate was provided, might, in his own right, as
" creditor, without the aid of a general ſervice, challenge any deed of
" his father's contrary to the ſettlements in the marriage-contract;
" and that he having died without making up proper titles to the e-
" ſtate, the purſuer thereupon became heir of the marriage, and had
" the ſame right to challenge that his father had; and that he had al-
" ſo right, without the aid of any ſervice, to diſcharge his claims, or
" tranſact the ſame: and found, That the general ſervice in the perſon
" of the ſaid purſuer, was inept and unneceſſary; and therefore ſuſ-
" tained the reaſons of reduction of the ſaid ſervice libelled: and found
" the ſaid purſuer, by the general ſervice, expede in his favour during
" his minority, is not ſubjected to or liable in payment of his father's
" debts; and decerned and declared accordingly: reſerving to the de-
" fenders to inſtruct, in habile terms, that the purſuer is benefited by
" the ſucceſſion to his father, in order to ſubject him in payment of
" his debts."

" The Lords adhered; and remitted to the Lord Ordinary to hear
" parties, How far the purſuer is benefited, or has taken any ſub-
" ject by ſervice to his father?" I. C.

Act. *Ferguſon, R. Dundas.* Alt. *Græme, Lockhart.* Clerk, *Gibſon.*

N. B. The court was much divided on the firſt point. It was propoſed to vary the interlocutor, and to ſuſtain the reaſons of reduction, without finding the ſervices unneceſſary or inept; but it carried by a caſting vote, to adhere to the whole interlocutor.

N° CCIII. 20th *December* 1759.

JOHN CLERK advocate in *Aberdeen*,

AGAINST

ALEXANDER BREBNER merchant in *Aberdeen*.

Engliſh *letters of adminiſtration equivalent to a licence to purſue in* Scotland.

Brebner and Company merchants in *Aberdeen*, in *December* 1755, commiſſioned from *Arthur Fletcher* of *London*, ſix hogſheads of vinegar; which were delivered to them accordingly.

Fletcher died in the end of the ſame month; and his ſiſter, the wife of *John Pott*, obtained letters of adminiſtration from the prerogative-court of *Canterbury*, as executor to him; and granted a power of attorney to her huſband.

In *January* 1756, *Pott* ſent an account of the vinegar to *Brebner*, and deſired payment at the uſual time of ſix months after the furniſhing.—*Brebner*, for himſelf *and Company*, thereupon wrote to his factor at *London*, 26th *February* 1756, in theſe words. " We received
" *per* the *Charles*, *Alexander Gordon* maſter, the ſix hogſheads ſent us

" *per*

" *per Fletcher;* and as he is ſince dead, let his executors know, that we " have given him credit for ſame, which ſhall be paid at the uſual time " of ſix months."

Pott drew a bill upon *Brebner and Company*, payable to *John Clerk*, for *L.* 12, 4 *s. Sterling*, as the price of the vinegar; which was proteſted for non-acceptance, and a proceſs thereupon brought before the ſheriff of *Aberdeen*; who decerned againſt *Brebner*, his partner having, by that time, failed.

Pleaded for *Brebner*, in a ſuſpenſion, The proceſs was brought before the ſheriff without the purſuer's inſtructing a ſufficient title, as the letters of adminiſtration were at no time produced there. And, 2*do*, Such letters, though they may have been ſuſtained *ad inchoandum litem*, yet have not hitherto been found a ſufficient title for the adminiſtrator to recover payment in *Scotland*, or to grant a valid diſcharge of a *Scots* debt.

Anſwered for the charger, No objection was made to Mr *Pott*'s title in the inferior court; and therefore ſuch objection comes now too late in the way of ſuſpenſion. And, 2*dly*, The debt purſued for was contracted in *England*; the goods were there furniſhed, and the price was there payable, to an *Engliſhman* reſiding in *England*; and therefore a title ſufficient in *England* ought to be ſuſtained here. Beſides, the ſuſpender's letter of the 26th *February* 1756, in return to Mr *Pott*'s, contained not only an acknowledgment of the debt, but a poſitive engagement to pay to *Fletcher*'s executor, which was a ſufficient homologation of Mr *Pott*'s title.

" The Lords found the letters orderly proceeded, and expences due; " but ordained the charger to confirm before extract." D. R.

Act. *Rae.* Alt. *Hamilton-Gordon.*

N° CCIV. 20th *December* 1759.

JOHN MACKENZIE of *Ardroſs*,

AGAINST

JOHN ROSS of *Auchnacloich*, and JAMES CUTHBERT of *Millcraig*.

Whether it be neceſſary to produce the grounds of an appriſing led in 1644, *in a competition with a poſterior appriſing, with regard to the reverſion of wadſet-lands contained in both appriſings, but poſſeſſed by neither of the parties?*

IN the year 1641, *Hugh Roſs* of *Tollie* granted a wadſet of his lands of *Culkennie*, mill of *Millcraig*, and others, to *William* and *Gilbert Robertſons*, elder and younger of *Kindeace*, redeemable upon payment of 20,000 merks. In 1721, this wadſet came into the perſon of their ſucceſſor *William Robertſon*; who was infeft in the wadſet-lands, in virtue of a precept of *Clare conſtat* from the ſuperior.

Hugh Roſs of *Tollie* died in the year 1643.

In 1644, *Mackenzie* of *Coull* obtained an appriſing of the property-

lands of *Tollie*, and of the wadſet-lands above mentioned, for payment of a conſiderable ſum, againſt *John Roſs*, as lawfully charged to enter heir to the ſaid *Hugh Roſs* his father; and, in 1647, he obtained another appriſing of the ſame lands for a different debt.

Theſe two appriſings, upon the firſt of which a charter and infeftment had paſſed in 1644, were purchaſed from *Coull*, in 1656, by *Alexander Mackenzie* of *Pitglaſſie*, and came by progreſs into the perſon of *John Mackenzie* of *Ardroſs*.

In the year 1650, *Thomas Manſon* led an appriſing againſt the ſaid *John Roſs* of the whole lands above mentioned; and, in 1652, another appriſing of the ſame lands was led by *Mackenzie* of *Inverlaal*.

Theſe two laſt appriſings, upon both of which charters and infeftments paſſed, were purchaſed in 1653 and 1658, by *John Roſs* of *Tollie*, againſt whom they had been led; and having paſſed to his ſucceſſive heirs, ſtood, in 1721, in the perſon of *Hugh Roſs* of *Auchnacloich*.

Upon the 23d of *May* 1721, *William Robertſon*, in whoſe perſon the wadſet then ſtood, diſponed the wadſet-lands to *Hugh Roſs* of *Auchnacloich*, redeemable always, and with and under the reverſion and right of redemption contained in the contract of wadſet. And, of the ſame date, *Hugh* executed a diſpoſition of theſe lands, under the title of heritable proprietor, in favour of his ſon *John*, and other heirs therein mentioned.

John died without iſſue; and was ſucceeded by *Robert Roſs* late of *Auchnacloich*, his uncle; who ſold the wadſet-lands, heritably and irredeemably, to *James Cuthbert* of *Millcraig*.

In 1756, *Mackenzie* of *Ardroſs*, whoſe predeceſſors had been in the conſtant poſſeſſion of the property-lands of *Tollie*, in virtue of the two appriſings led by *Mackenzie* of *Coull*, brought a proceſs for declaring his right to the reverſion of the wadſet-lands, which were likewiſe contained in the ſaid appriſings, but which had remained conſtantly in the poſſeſſion of *Robertſons* the wadſetters, until their right was diſponed to *Hugh Roſs*.

In this proceſs, *John Roſs* of *Auchnacloich*, the ſon of *Robert*, and *James Cuthbert* of *Millcraig*, appeared as defenders; and founding upon the poſterior appriſings, obtained by *Manſon* and *Inverlaal*, they *pleaded*, That *Ardroſs* had no title to challenge their rights, or to redeem the lands, until he ſhould produce the grounds of his author's appriſings; ſeeing neither he, nor any of his predeceſſors or authors, had ever been in the poſſeſſion of theſe lands, ſo as to acquire a right by preſcription.

Anſwered for the purſuer, The charter of appriſing of the wadſet-lands, and infeftment which followed thereon in the year 1644, regularly tranſmitted by progreſs to the perſon of the purſuer, afforded a complete title to the right of reverſion, without production either of the appriſing itſelf, or of the grounds of debt upon which it proceeded; for that the ſaid charter and infeftment completely denuded *Hugh Roſs* of *Tollie*, and veſted in *Mackenzie* of *Coull* the reverſion of the wadſet-lands: and as the poſſeſſion of the wadſetter is, in the eye of law, the poſſeſſion of the reverſer, it being the only poſſeſſion of which a right of reverſion can admit; therefore the purſuer has acquired a good title by preſcription to the reverſion of the wadſet-lands, as well as to the property of the other lands, which were all along poſſeſſed by him and his predeceſſors.

Replied

Replied for the defenders, Neither appriſing nor infeftment could denude *Tollie* of the reverſion, unleſs the appriſing were ſupported by its grounds, or the infeftment confirmed by preſcription. And the purſuer argues altogether *in circulo:* He allows, that without preſcription, an appriſing, wanting grounds, could not convey the reverſion; but he attempts to build preſcription upon the wadſetter's poſſeſſion: and in order to prove the title he has to found on that poſſeſſion, he ſuppoſes, that he came in right of the reverſion by the appriſing 1644, which is juſt taking for granted the point that it was incumbent upon him to have proved. The appriſing 1644, ſupported by no grounds, gives him no title to the reverſion, more than a diſpoſition without witneſſes. The infeftment can add no further title, unleſs confirmed by preſcription. Preſcription cannot be without poſſeſſion; and he has no title to claim the benefit of the wadſetter's poſſeſſion, unleſs he prove his antecedent title to the reverſion, which he has not done.

Further, though it ſhould be admitted, that this purſuer, if he were in a queſtion with the wadſetter, might be intitled to redeem the wadſet, without producing the grounds; yet the caſe is extremely different in a competition betwixt two appriſings, each of which, *ex facie*, gives an equal right to the reverſion.—In ſuch caſe, the right of reverſion ſtands ſuſpended, until the competition be determined; and the wadſetter's poſſeſſion will operate *retro* in favour of the party who ſhall be found to have the preferable right; but until that point be determined, neither of them can plead upon ſuch poſſeſſion.

Obſerved from the bench, The wadſetter's poſſeſſion is the reverſer's, when it appears who is the reverſer; but where that is the queſtion, his poſſeſſion will apply to neither party againſt the other, though to both, if joined againſt any third party, or to him who prevails, and is found to have the true right.

"The Lords found, That the purſuer is obliged to produce the "grounds of his appriſing." G. C.

Act. *Dav. Dalrymple junior. Fra. Garden, Tho. Miller, John Craigie.* Alt. *Lockhart, Ferguſon.*

N° CCV. *2d January* 1760.

DUKE of GORDON, and his CURATORS,

AGAINST

His MAJESTY's ADVOCATE.

Whether a cautioner is liable in annualrent ex mora, *where no annualrent is decerned for, nor diligence uſed by horning and denunciation?*

THE Duke of *Gordon* and his curators granted a factory to *Macdonald* of *Lochgary*, for uplifting the rents of ſome of the Duke's lands. *Lochgary* became bound as principal, and *Gordon* of *Glenbucket* as cautioner for him, conjunctly and ſeverally, "That *Lochgary* ſhould not "only do exact, punctual, and timeous diligence for recovering "payment of the rents, but alſo make juſt count, reckoning, and

"payment

" payment of his intromiſſions, to the Duke and his curators, when-
" ever called thereto."

The Duke brought a proceſs againſt *Lochgary*, and his cautioner *Glenbucket*, to account for his intromiſſions; and *Lochgary* having thereupon fitted accounts, the balance due by him to the Duke amounted to *L.* 9241 *Scots*; for which ſum he granted bond, bearing annualrent from *Whitſunday* 1742.

The Duke proceeded in his proceſs againſt *Glenbucket*, and obtained a decreet, finding him, as cautioner for *Lochgary*, liable for the foreſaid balance of *L.* 9241 *Scots*, and decerning him to make payment of that ſum. The ſummons concluded for payment of principal and intereſt; but the decreet makes no mention of intereſt.

Glenbucket having been attainted of high treaſon, the Duke of *Gordon* entered a claim, in terms of the veſting act, for the ſaid ſum of *L.* 9241, with annualrent thereof from *Whitſunday* 1742.

No objection was made to the debt; but his Majeſty's advocate *objected* to the claim for annualrents.

Pleaded for the claimant, That *Glenbucket* being equally bound with *Lochgary*, is liable in every obligation incumbent on him. *Lochgary* was certainly bound to pay the annualrent claimed: for this is implied in the nature of a factory or mandate, that the factor is faithfully to account to his conſtituent for the money that comes into his hands, as ſoon as a demand is made upon him; and if he detains it, he muſt be liable in the intereſt *nomine damni*. So it was laid down in the Civil law, *l.* 10. § 3. *De Mandato*. The ſame rule was obſerved in a caſe determined 6th *December* 1752, *Campbell contra Roſe*.

Though in the decreet againſt *Glenbucket* no particular mention is made of annualrent; yet, as it was ſpecially charged in the libel, and is founded in the nature of the engagement, and not diſallowed by any interlocutor, the decreet muſt be conſtructed in terms of the libel, in a thing which was merely acceſſory, and liable to no objection.

Anſwered for his Majeſty's advocate, As no annualrent was ſtipulated in the obligation granted by *Lochgary* and *Glenbucket*, none can be claimed upon it, unleſs a horning and denunciation had followed. The act of ſederunt, by which factors named by the court of ſeſſion are bound to pay annualrent from a year after the rents falls due, plainly ſuppoſes, that at common law they would not be liable for annualrent. The text quoted from the Civil law, *l.* 10. § 3. *De Mandato*, only proves, That a mandatary is liable in annualrents *ex mora*. And annualrents are likewiſe, by the law of *Scotland*, due *ex mora*: but then the law has pointed out what is neceſſary to put the debtor *in mora*, ſo as to eſtabliſh a claim for annualrents; which is nothing leſs than a denunciation upon a charge of horning.

Suppoſing a claim in equity lay againſt *Lochgary* for annualrents, as having had the uſe of the money; yet cautionary obligations are *ſtrictiſſimi juris*; and therefore this demand ought not to be extended againſt *Glenbucket*, who was no gainer by *Lochgary*'s delay. In the caſe of *Campbell* againſt *Roſe*, the queſtion was not with a cautioner, but with the factor himſelf, who had intromitted with the money.

The decreet againſt *Glenbucket*, finding him only liable in the ſum of *L.* 9241, without mention of annualrents, though the libel concludes for annualrents, is in effect a *res judicata* as to this claim. If

for

for theſe reaſons no annualrents could have been found due againſt *Glenbucket*, far leſs can they in a queſtion with the crown, as the crown is never *in mora*, but always ready to pay the claims of lawful creditors, when properly aſcertained.

" The Lords found no annualrent due, none having been decerned " for in the decreet, nor a regiſtrate horning produced," W. N.

For the claimant, *Ferguſon*. For the crown, *Macqueen*. Clerk, *Kirkpatrick*.

N° CCVI. 2d *January* 1760.

ROBERT MACLAUCHLAN of that Ilk,

AGAINST

ALLAN MACLAUCHLAN.

Bill bearing annualrent and penalty, ſuſtained, where the debt is acknowledged by the accepter.

IN the year 1726, *Allan Maclauchlan* accepted a bill to *Evan Maclauchlan*, for 1000 merks, *with annualrents and penalty, conform to law*, which is holograph of *Allan* the accepter.

Robert Maclauchlan acquired right to this bill. *Allan* paid the annualrents regularly for ſeveral years; but having at length refuſed payment, *Robert* brought an action againſt him.

Objected for the defender, The bill is null, as bearing annualrent and penalty.

Pleaded for the purſuer, 1*mo*, At the period when this bill was granted, the form in which it is executed was held legal. By deciſions of a later date, the contrary has been found; but ſuch deciſions ought not to have a retroſpect. 2*do*, The words in the bill, " annualrent and pe- " nalty, *conform to law*," can have no effect. Annualrent is due, whether it be ſtipulated or not; penalty is not due, although ſtipulated: the words are therefore ſuperfluous, and muſt be held *pro non adjectis*. The defender is barred, *perſonali exceptione*, from objecting this nullity; for that he himſelf both wrote the bill, and homologated it by payment of annualrent for ſeveral years.

Anſwered for the defender, Bills were introduced for the benefit of commerce, to facilitate tranſactions, by ſupplying the place of ready money, but not to remain as permanent ſecurities: That therefore the form of bills in all trading countries is preciſe and uniform; and in every country, except *Scotland*, their endurance is limited by a ſhort preſcription: but as in this country there is no ſtatute of limitations, the court has been the more attentive to define the nature and form of ſuch ſlender ſecurities, and to declare them void when they contain ſtipulations beyond their proper form. The conſequences ariſing from their being employed as permanent rights in place of bonds, and other formal deeds, would be dangerous; therefore it has been found, by a ſeries of deciſions, that bills bearing annualrent and penalty are null. It is of no moment, that the bill is written by the defender. The form of

every obligation is presumed to be the operation of the creditor; although it may be the act of the debtor, yet he is presumed to grant that sort of security which the creditor demands: to it therefore the debtor, when pursued, may object. The very style of a bill is the language of the creditor making a demand, like the *Roman* stipulation; and therefore if he makes an improper demand, and thereby frames an informal security, he has himself to blame.

"The Lords, as the debt is acknowledged, sustained the bill." W. N.

Act. *J. Campbell junior.* Alt. *Garden.* Clerk, *Kirkpatrick.*

N° CCVII. 2d *January* 1760.

ELISABETH HART, relict of *Andrew Falconer*, and *David Lothian* writer in *Edinburgh*,

AGAINST

ROBERT PRINGLE writer in *Kelso*.

Bond taken to a trustee, and bearing value received from him, not reducible on the trustee's deponing that he did not know of any value being paid.

Elisabeth Hart, in 1738, being some time after her husband's death, granted a bond to *James Shearer*, for *L.* 1000 *Scots* of principal, with annualrent and penalty. The bond bore, "That she granted her "to have received, from *James Shearer*, the sum of *L.* 1000 *Scots*; re- "nouncing all exceptions of the law proponable in the contrary for "ever." It also contained an assignment to Mr *Shearer*, in security of the debt, of her liferent-annuity of 400 merks, payable out of the lands which had belonged to her husband *Falconer*. — This assignation was duly intimated, in *March* 1739, to the factor on *Falconer*'s subjects.

In *June* 1740, *Shearer* assigned the bond to *Robert Pringle*; who, in *January* 1744, raised letters of inhibition upon it against *Elisabeth Hart*, and execute the same at her dwelling-house. — In *April* 1745, he raised and executed a summons of adjudication against her, of her interest in *Falconer*'s subjects; upon which two decernitures were obtained, in *July* 1746, and *February* 1747: but Mr *Pringle* dying in *March* 1747, decreet was not extracted. — A title to this debt was afterwards made up by his nephew *Robert Pringle junior*.

In 1755, a ranking and sale of *Falconer*'s subjects was raised; and the above bond, and diligence upon it, was then produced as Mr *Pringle*'s interest.

To this interest it was *objected*, by *Elisabeth Hart*, and *David Lothian*, another of her creditors, That the bond was granted *sine causa*, notwithstanding its narrative, in so far as it was given *spe numerandæ pecuniæ*, or on the faith of a subsequent loan, which was never made; and therefore that the bond was void and null.

The

The Lords, *before answer*, examined *James Shearer*; who deponed, "That *James Graham* writer in *Edinburgh*, (lately deceased), about "twenty years ago, told the deponent, that *William Montgomery* was "owing him considerable sums of money, and had offered to get him, "from one *Elisabeth Hart*, a bond for about *L.* 100 *Sterling*, or *L.* 1000 "*Scots*, in payment or security in part of what he owed him; and thinks "Mr *Montgomery* was present when Mr *Graham* told the deponent the "above, but cannot be positive thereof: That Mr *Graham* proposed to "the deponent that he would take the said bond in the deponent's "name; to which the deponent consented, provided he was put to no "trouble or expence thereanent. Accordingly the said bond was grant-"ed; and Mr *Graham* brought the bond, with an assignation thereof, "wrote out in favour of Mr *Robert Pringle*, to the deponent, and de-"sired him to sign the said assignation; which he did at his desire. "And as to the deponent's being present at *Elisabeth Hart*'s granting "the said bond, he does not think he was present: and as to the bond "its being delivered to the deponent, or having been any time in his "custody, he remembers nothing about it further than he has deponed."

Mr *Pringle* did not alledge, that either *Shearer* or *Graham* paid value to the granter for this bond; but *insisted*, That no advantage was taken of her; that it had been given in pursuance of an agreement between her and *Montgomery*; and that *Graham*'s affairs having been in some disorder, was the reason of his taking the bond in the name of *Shearer* as his trustee.

Certain writs were produced for shewing, that *Montgomery* had been, at the date of the bond, owing Mr *Graham* considerable sums; and that he soon after got credit from *Graham* for a sum corresponding to the contents of the bond, though without specially mentioning it.—— It likewise appeared, that Mr *Graham* was indebted greatly to Mr *Pringle*; that Mr *Pringle* had got this bond assigned to him in security of those debts; and that he was bound to reconvey it to Mr *Graham*, if his debts were otherwise cleared between and a certain term, but which they were not.

William Montgomery was also examined as to the cause of granting the bond. He acknowledged sundry transactions both with *Elisabeth Hart* and *James Graham*; but deposed, "That he never solicited *Elisa-"beth Hart* to interpose her credit for him to *James Graham*, so far as "he remembered: That he never desired or prevailed with her to grant "a bond to *James Shearer* for *L.* 1000, in 1738, or any other time; "nor did he remember to have heard, that such a bond had been "granted till the 1756 or 1757; and that he never got from *Graham* "any receipt for such bond, or saw or heard of any such receipt's be-"ing granted."

Pleaded for the objectors to the bond, 1*mo*, The circumstance of this bond's being taken in *Shearer*'s name, the assignment to *Pringle*, and the letting it lie over for so many years, without insisting for payment, till all the parties to the transaction were dead excepting *Shearer*, *Montgomery*, and the granter, render this bond highly suspicious. 2*do*, The onerous cause of borrowed money assigned in the bond itself, is disproved by the oath of *Shearer*, the original creditor. *Montgomery* has denied the whole transaction; and the creditor having not been able to bring

bring evidence of any other reaſon for granting it, it muſt be reduced as granted *ſine cauſa*. 3*tio*, At leaſt it is incumbent on Mr *Pringle*, in a queſtion with Mr *Lothian*, an onerous creditor of *Eliſabeth Hart*, to prove an onerous cauſe for her granting this bond; otherwiſe it muſt be preſumed gratuitous, and, as ſuch, give way to her more onerous debts.

Anſwered for Mr *Pringle*, 1*mo*, Every ſtep was taken that could be available for making this debt effectual, by a ſeries of diligence. And the taciturnity of the granter, for ſuch a courſe of years, when that diligence was repeatedly notified to her, muſt preſume her ſenſe of the juſtneſs of the debt. 2*do*, Mr *Pringle* being an onerous aſſignee, the oath of *Shearer*, as his cedent, cannot be good againſt him; far leſs can the oath of a truſtee, ſuch as *Shearer* was for *Graham*, his real cedent. Further, the oath of *Shearer* does not diſprove the cauſe of granting expreſſed in the bond; becauſe it only imports, that he paid no money to the granter; which muſt be true in every caſe where a bond is taken in a truſtee's name, though the money be truly advanced by the real creditor. And as to *Montgomery*, he is no better than a ſingle witneſs, whoſe oath cannot take away a written obligation. 3*tio*, It is ſufficient for the aſſignee to the bond, eſpecially in a queſtion with the granter, that he proves the onerous cauſe by the bond itſelf, duly executed. Nor can her creditor Mr *Lothian* be in a better caſe. Neither of them have proved, that the bond was granted *ſpe numerandæ pecuniæ*, and that the money was never paid: and ſuppoſing the narrative had been proved falſe, that would only give ground for preſuming the bond gratuitous; which could not annul it, or leſſen its effect, as ſtill a debt is thereby eſtabliſhed, if no fraud is proved to have been committed in the obtaining it.

Replied, It has been admitted by Mr *Pringle*, that no value was paid to the granter either by *Shearer* or *Graham*; which, *per ſe*, clearly diſproves the onerous cauſe mentioned in the bond; and neither Mr *Pringle* nor his uncle ever were properly onerous aſſignees, but only aſſignees in ſecurity; and now this competition is carried on in his name by the heir of *Graham* his debtor.

This caſe appeared to be attended with a good deal of difficulty; and the court, by one interlocutor, found the bond not binding; but it afterwards carried to ſuſtain it.

" The Lords repelled the objection to the bond." D. R.

For the objectors, *Pat. Murray*, *Hamilton-Gordon*. For *Pringle*, *Dav. Rae*. Clerk, *Juſtice*.

N° CCVIII.

N° CCVIII. 4th *January* 1760.

Sir HARRY MONRO of FOWLIS,

AGAINST

MACKENZIE of INCHCOULTER.

Where a right of paſturage is duly conſtituted, it imports no diminution of the ſervitude, that the cattle, during certain months of the year, are graſed upon other grounds.

SIR *Harry Monro*, by his charters, and immemorial poſſeſſion, had right, as proprietor of the lands of *Drummond*, to a ſervitude of paſturage on a muir, the property of *Mackenzie* of *Inchcoulter*.

In ſetting aſide as much of the muir as might be ſufficient for the paſturage of the cattle of the lands of *Drummond*, *Inchcoulter* inſiſted, That the paſturage of the months of *June*, *July*, and *Auguſt*, ſhould be deducted; as it was proved, that in theſe three months the cattle of *Drummond* did not paſture upon the muir in queſtion, but were always ſent to the hills.

Pleaded for Sir *Harry Monro*, That as his right to the ſervitude was conſtituted by writing, he was intitled to it in its full extent. To poſſeſs a ſervitude, did not require conſtant poſſeſſion; as there are many which, in the nature of things, can only be exerciſed from time to time. His tenants, who ſought to graſe their cattle properly, ſent them to the hills in the ſummer-time, becauſe the hill-paſture was better; yet that was *res meræ voluntatis*, and could infer no limitation of the ſervitude; and as the right of paſturage on the muir was unlimited, it made no difference whether the cattle paſtured there for days, weeks, or months.

Anſwered for *Inchcoulter*, That he had the undoubted property of the muir, and his tenants conſtantly paſtured thereon, having no other paſture: That both his right of property, and the benefit accruing to his tenants from their poſſeſſion, would be impaired, if the proprietor of the lands of *Drummond* was to have allowance for the ſummer-paſtures, which he had never enjoyed: That the value of his ſervitude ought to be eſtimated by the actual uſe which he had made of it.

"The Lords found, That Sir *Harry Monro*'s cattle their graſing in "the hill for the months of *June*, *July*, and *Auguſt*, yearly, im- "ports no diminution of his ſervitude of paſturage over the muir "in queſtion." W. N.

For Sir *Harry Monro*, *Lockhart*. Alt. Sir *David Dalrymple*. Clerk, *Forbes*.

N° CCIX. 8th *January* 1760.

CREDITORS ADJUDGERS on the eſtate of *Langton*, not infeft,

AGAINST

The ADJUDGING CREDITORS infeft on that eſtate.

Inhibition affects the leaſt preferable of the rights againſt which it ſtrikes, and not all theſe rights pro rata.

IN the ranking of the creditors of *Langton*, it was *inſiſted* for the adjudging creditors *not infeft*, That the ſums to be drawn by the creditors-inhibiters, in virtue of their inhibitions, ought to be allocated proportionally among the whole debts that are ſtruck at by their diligence.

On the other hand, it was *contended* for the creditors *infeft*, That the inhibiting adjudgers ought to draw their payment out of the firſt and readieſt of the price, and then the other creditors be ranked upon the remainder in their order; by which the ſums drawn by the inhibiters would firſt affect the creditors not infeft, and next the leaſt preferable infeftments, agreeably to the deciſion 3d *January* 1747, in the caſe of *Lithgow* againſt the creditors of *Elliot* of *Whithaugh*.

Pleaded for the adjudging creditors not infeft, That inhibition is only a prohibitory diligence, calculated to prevent the debtor from alienating to the prejudice of his creditor; but gives the creditor no preference, nor real right upon the lands, till he eſtabliſh it by other diligence: That, to conſider inhibition as giving a preference, would lead to abſurd conſequences; for inſtance, if there are two annualrenters in the field, the firſt of whom only is ſtruck at by the inhibition, if the inhibiter, as having a preference, is ranked *primo loco*, and then the annualrenters in their order, this abſurdity will follow, That the firſt annualrenter, though ſtruck at by the inhibition, may draw his full debt; and yet the ſecond annualrenter, againſt whom the inhibition does not ſtrike, be cut out. To prevent ſuch abſurdities, the real rights affecting the lands muſt be ranked in the firſt place, and draw according to their order; after that it falls to be conſidered, what perſonal claims may lie againſt any of theſe real creditors; an inhibition, though not a real right, affords a claim againſt thoſe who obtained real rights from the debtor after he was inhibited. This is of the nature of a claim for damages; and the queſtion is, In what manner thoſe damages are to be aſcertained among the ſeveral creditors ſtruck at by the diligence? They ought to affect the whole equally and proportionally, for the following reaſons.

Firſt, Every one of the debts and ſecurities ſubſequent to the inhibition is equally liable to reduction. This is evident from the ſtyle of the diligence, whereby the debtor is expreſsly prohibited to make any alienation, contract any debt, or do any deed, and the lieges are prohibited to accept of any right or obligation from him, to the prejudice of

of the creditor. Every alienation and every contraction is prohibited. It is no defence to one who contracts *ſpreto mandato*, That he left ſufficient fund. The fund muſt be left unimpaired, as it was at the date of the diligence. To diminiſh it the law conſiders as a prejudice done to the inhibiter. It is not neceſſary for him to qualify any other prejudice, or to ſay, that he is diſappointed of his payment by the deed which he ſeeks to reduce: nor is he obliged to enter into a litigation concerning the circumſtances of his debtor. That ſuch has always been the conſtruction of this diligence, appears from *Craig, lib.* 1. *dieg.* 12. § 31.; and the deciſion, *November* 27. 1630, *Douglas contra Johnſton*; as alſo from the conſtant tenor of the decreets of the court, *ex capite inhibitionis.*

Secondly, Whatever a party ſtruck at by inhibition is obliged to repay to the inhibiter out of the ſums he ſtood ranked for by his infeftment, he can have no recourſe againſt creditors afterwards infeft, who are not ſubject to the ſame diligence; and who are therefore not obliged for relief of a ſum drawn from him, upon a defect in his own right. This rule is laid down by Lord *Stair*, *lib.* 4. *tit.* 35. *Competition*, § 29. and confirmed by deciſions of the court; in the ranking of the creditors of Sir *Thomas* and Sir *William Nicolſons*; and, *February* 1730, *Campbell contra Drummond.*

Thirdly, Where an inhibition ſtrikes againſt ſeveral purchaſes or annualrent-rights, affecting different parts of the ſame debtor's eſtate, the effect of it is allocated proportionally upon the ſeveral lands or heritable debts; and if the inhibiter inſiſts to draw his whole debt out of any one ſubject, he muſt aſſign his diligence to the perſon from whom he draws, that he may operate a proportional relief, upon the ſame ground that a creditor having a catholic infeftment over ſeveral tenements, when he recovers his whole debt from the purchaſer of one tenement, is obliged to aſſign to him his infeftment, that he may recur againſt the reſt. In the ſame manner, a proportional allocation ought to take place where the inhibition ſtrikes againſt ſeveral annualrent-rights or ſecurities affecting the ſame tenement, as each of them is ſubject to a ſeparate reduction at the inhibiter's inſtance. If one creditor obtains infeftment from the common debtor after inhibition, in the tenement A, and another in the tenement B, they are no doubt equally liable to a proportion of the inhibiter's debt. It ſeems incongruous then to ſuppoſe, that the proportional allocation ſhould be excluded, becauſe the creditors had got both tenements comprehended under their infeftments.

In conformity to theſe principles, the rule univerſally followed in all rankings down to the caſe of *Whithaugh*, was, That all the creditors whoſe ſecurities were ſtruck at by an inhibition, were ſubjected proportionally to the debt of the inhibiter.

This caſe is ſimilar to a reduction upon the ſecond clauſe of the act 1621, where it was never doubted, that all the ſecurities granted by an inſolvent debtor, after diligence againſt him by a prior creditor, are equally ſubject to reduction at the inſtance of that creditor; and therefore the law divides the burden amongſt them proportionally.

Upon the ſame principle, if two heritable creditors conſent to a ſubſequent contraction, the creditor conſented to may inſiſt againſt either; but as he who pays is intitled to demand an aſſignation, the reſult muſt be

be a proportional diſtribution. This caſe is extremely analogous to the preſent: It may be ſaid, without impropriety, that one who contracts after inhibition, virtually conſents to the payment of the inhibiter's debt.

In the ſame manner, where a number of cautioners bind for the ſame debt at different times; as they are all equally bound to the creditor, any one who is forced to pay, is intitled to an aſſignment. So it was found, 15th *December* 1722, *Murray contra* heirs and creditors of *Orchyardton*, and affirmed by the houſe of Lords.

Pleaded for the creditors infeft, That the tendency of an inhibition, as is evident from the ſtyle of it, is not abſolutely to reſtrain the inhibited perſon from contracting debts, or the lieges from dealing with him; but only in ſo far as the inhibiter may thereby ſuffer prejudice: in other reſpects, the creditors fall to be ranked, and draw their payment, without regard to the inhibition. The inhibiter ſuſtains no prejudice, ſo long as there is a ſufficient fund for paying his debt: he cannot therefore interfere in the ranking. What proves, that inhibition has no effect, unleſs the inhibiter can qualify a loſs, is, that debts, though contracted poſterior to the inhibition, if the inhibiting creditor ſuſtains no prejudice from them, will draw a part of the price, while the inhibiter draws nothing. If, for example, there are adjudications againſt which the inhibition does not ſtrike, ſufficient to exhauſt the whole price, the inhibiting creditor muſt be entirely ſet aſide, while, at the ſame time, other adjudgers, though poſterior to the inhibition, if within year and day of the former, will be ranked *pari paſſu* with them.

It would be deſtructive of the ſecurity of the records, that a perſon who lent his money, and for ſecurity took infeftment upon a large eſtate, which he ſaw from the records was liable to no prior incumbrance, but an inhibition for a ſmall ſum, ſhould ſuffer prejudice by poſterior infeftments granted to other creditors.

The prior infeftment upon record has, by law, the ſame effect againſt poſterior infeftments, as the inhibition has, with reſpect to all debts poſterior to it; as therefore the inhibiter is intitled to draw his payment out of the firſt and readieſt of the price, any loſs ariſing from the deficiency of fund ought to fall upon the leaſt preferable infeftment.

The analogy of a reduction upon an inhibition, to that upon the act 1621, is juſt; but in neither caſe is the creditor who uſed the diligence intitled to reduce all poſterior contractions, further than to ſecure payment of his debt. A challenge *ex capite inhibitionis*, though in the form of a reduction, is in reality no other than a declarator, that notwithſtanding the poſterior contraction, the inhibiter ſhould have the ſame acceſs to affect the lands, as if ſuch poſterior deeds had not been granted. It is perſonal to the inhibiter, and no third party is intitled to avail himſelf of it; as was found, 26th *January* 1636, Lady *Borthwick contra Ker*; and 7th *January* 1680, *Hay contra* Lady *Balledgarno*.

With regard to the caſe put, of two annualrenters, the firſt of whom, though ſtruck at by the inhibition, may draw his full debt, while the ſecond, againſt whom the inhibition does not ſtrike, draws nothing, if the inhibiter is to have a *primo loco* preference; it is anſwered, That where

where any of the annualrenters is prior to the inhibition, the inhibiter cannot be ranked *primo loco*; but the annualrenters muſt be ranked amongſt themſelves in their order, and then the inhibiter draws his payment from the annualrent-right ſtruck at by his inhibition.

The argument from ſeveral purchaſes or infeftments, affecting different parts of the ſame debtor's eſtate, does not apply to the preſent caſe, where all the creditors have their ſecurity upon the ſame ſubject: for here the firſt annualrenter is as much preferable to the poſterior ones, as the inhibiter is to them all; whereas, in the other aſe, the different purchaſers or annualrenters have no connection with one another.

In the ſame manner, where the annualrenters are all *in pari caſu*, and there is one catholic infeftment preferable to the whole, equity obliges the creditor to take his payment proportionally from the whole, or to aſſign; but where the creditors have their ſecurity upon the ſame ſubject, preferable amongſt themſelves, according to the priority of their infeftment, no equity can intitle the laſt infeft to draw any thing, while a preferable creditor is unſatisfied.

Upon theſe principles, the judgment of the court was founded in the caſe of the creditors of *Whitehaugh*; which ſolemn deciſion, pronounced with great deliberation, was underſtood to fix the rule in all time coming; and which accordingly has been uniformly followed in all the rankings that have ſince occurred.

Anſwered for the adjudgers not infeft, That it is true, caſes may be figured, where the inhibiter can draw nothing, and yet the debts ſtruck at by his inhibition may draw. This can only happen, when the debtor's eſtate is wholly exhauſted by ſecurities which cannot be affected by the inhibition; in which caſe the inhibiter cannot challenge any of the ſubſequent debts, as his reduction is only to this effect, that he may draw what he would have drawn if the poſterior debts had not exiſted: and therefore, when the fund is exhauſted by prior creditors, the reduction cannot have any effect; but when there remains fund not pre-occupied, the inhibition affects the whole and every part of it.

With regard to the ſecurity of the records, it is evident, that the rule contended for on the other ſide can give no ſecurity; as inhibition is a prohibitory diligence which gives no preference. One who lends a ſum of money, after an inhibition, even for a ſmall ſum, cannot have abſolute ſecurity, however large the eſtate be, unleſs he ſee the inhibiter either paid or ſecured; for although he take infeftment, another infeftment may afterwards be taken upon an heritable bond prior to the inhibition, for a ſum perhaps near equal to the value of the eſtate; and as the inhibiter muſt be paid out of the remainder, the creditor lending after the inhibition will be entirely cut out: or there may be perſonal debts, not ſtruck at by the inhibition, which may by diligence evict the greateſt part of the eſtate, leaving no more than to pay the inhibiting creditor; or the perſon inhibited may die, and his heir give an heritable bond for near the value of the eſtate, which bond would not be affected by the inhibition.

The creditor has many ways to ſecure himſelf againſt this hazard. He may, when he lends his money, ſee a part of it applied to clear the inhibiter's debt; or he may take care to get the inhibiter ſecured by infeftment; or he may inſiſt, that the debtor to whom he lends his

money, give him real warrandice againſt the effect of the inhibition; or he may uſe inhibition againſt the debtor upon his perſonal warrandice. By theſe methods, a creditor, lending after inhibition, may attain full ſecurity, which, from the nature of the diligence, the records cannot afford him.

Great deference is due to every judgment of the court; but the variation of the ſingle deciſion in the caſe of *Whitehaugh*, is not of equal conſequence with departing from a rule anciently ſettled and invariably obſerved, and ſo cloſely connected with the ſyſtem of our real preferences, that departing from it may endanger other parts of that ſyſtem.

"The Lords found, That although the inhibitions, being prior to "the competing annualrent-rights, did ſtrike againſt them all e-"qually; yet any deficiency ariſing from the ſhortcoming of the "fund of payment, did not affect equally, or *pro rata*, all the com-"peting annualrent-rights, which ſtood ranked and preferred one "to the other according to the priority of their infeftments, but "that the ſame muſt affect the annualrenters leaſt preferable."

W. N.

For the adjudgers infeft, *Ferguſon*. Alt. *Lockhart*. Clerk, *Juſtice*.

N° CCX. 9th *January* 1760.

Mr MICHAEL MENZIES Advocate, TRUSTEE for *Charles Renton*,

AGAINST

JAMES MACHARG of *Kiers*, and the CREDITORS of the deceaſed *John Gilleſpie* of *Greenhill*.

Challenge of a ſale upon the head of fraud and circumvention, found good againſt ſingular ſucceſſors of the buyer, who had contracted with him during the dependence, though there was an alledged mora *on the part of the purſuer.*

Mary Young, proprietor of the lands of *Greenhill*, was married to *Alexander Renton*, who went to *America* in the year 1725 or 1726, leaving a factory with his wife, impowering her to manage his affairs, to grant proviſions to their younger children, to contract debts, and to ſell his land in *Edinburgh*, or in the country.

John Gilleſpie having advanced conſiderable ſums to *Renton* before his departure for *America*, for which he obtained ſecurity over the wife's lands of *Greenhill*, did thereafter advance other ſums to her, for which ſhe granted heritable bonds over the ſame lands.

Upon the 15th of *December* 1732, Mrs *Renton* granted a diſpoſition to *Gilleſpie* of theſe lands of *Greenhill*, for the price of 19,600 merks; and upon this diſpoſition *Gilleſpie* was immediately infeft.

Gilleſpie continued in the quiet poſſeſſion until the year 1742; when *Renton* having returned from *America*, concurred with his wife in a reduction

duction of the ſale, upon the head of fraud and circumvention; but he having died ſoon thereafter, ſhe conveyed her right to Mr *Michael Menzies* advocate, in truſt for *Charles Renton*, her grandſon, an infant of eleven years of age.

Little procedure was had in this proceſs before the year 1748, when it was allowed to ſleep till the year 1756; during which period *Gilleſpie* had contracted ſundry debts, had granted heritable ſecurities upon the lands, and at laſt executed a diſpoſition in favour of a truſtee, for the behoof of his whole creditors, from whom the lands were purchaſed in 1753, by *James Macharg*.

The proceſs having been wakened by Mr *Menzies* in 1756, *Macharg* the purchaſer, and the creditors of *Gilleſpie*, endeavoured to maintain the fairneſs of the tranſaction in 1732; but a proof being allowed, and adviſed, the Lords, by their interlocutor of the 29th *June* 1759, found the reaſons of reduction of fraud and circumvention relevant and proven; and therefore reduced the diſpoſition granted by *Mary Young* to *John Gilleſpie*, and the infeftment following thereon.

Pleaded in a reclaiming bill for the purchaſer and creditors of *Gilleſpie*, *Primo*, Suppoſing the tranſaction in 1732 to have been improperly or unduly conducted; yet the diſpoſition ought not to be reduced *in totum*, but only in ſo far as to give the purſuer acceſs to recover the difference betwixt the price agreed upon, and what the lands might have been ſold for at the time. The *Roman* law, ſo famous for its equity in caſes of this kind, when there was no fraud in the bargain itſelf, when *dolus non dedit cauſam*, but only an inequality appeared in the price, gave the proper remedy by the *actio quanti minoris*; and it never can be equitable to carry the remedy further than to redreſs the wrong, which here conſiſted only in the lowneſs of the price.

Secundo, It is a principle of the law of this country, as well as of the *Roman* law, That *dolus auctoris non nocet ſucceſſori*; and in conſequence of this rule, the purchaſer from *Gilleſpie* and his creditors, ſome of whom had received heritable ſecurity from him at the time they lent their money, and the whole of whom were infeft in the perſon of their truſtee, cannot be affected by his fraud. The only foundation for giving a preference to the purſuer which can poſſibly be conjectured, is this, that the ſubject became a *res litigioſa*, by the proceſs of reduction. But to this the following anſwers obviouſly occur. *Imo*, As the records are the boaſted ſecurity of this nation, upon which creditors and purchaſers are to rely, ſo when a perſon appears upon the record to be infeft, and when, from the other records, there appears no legal diligence, nor any other bar to his diſpoſing of the property, a creditor, or even purchaſer, is *in optima fide* to deal with him, and cannot be affected by the conſequences of any perſonal challenge againſt him. Suppoſing a ſummons executed againſt him, or ſome ſteps taken in a proceſs; yet as this challenge does not appear from the records, purchaſers and creditors cannot be hurt by it. They are not bound to rummage the clerk's offices, in order to ſearch for perſonal challenges of this kind, which it is often difficult, and ſometimes impoſſible to diſcover, as daily experience ſhews, that proceſſes cannot be found which it is certain once depended. Nor does this doctrine in the leaſt affect the rights of any party who acts in a regular manner; for the law has given the remedy of an inhibition, by which thoſe who have rights competent,

competent, upon a perſonal challenge, may provide againſt alienations to their prejudice. 2*do*, When the defence of *res litigioſa* is pleaded, it muſt be a ſufficient anſwer, That the perſon pleading it has been *in mora*, and has not conducted his proceſs in a regular manner, and with becoming diſpatch. For where ſuch *mora* occurs, there is no *mala fides* upon the part of the creditors, or purchaſer from the defender, in the action: the law turns the tables, and preſumes a *mala fides* in the negligent purſuer; and will not permit him to argue from his own *culpa*, to diſtreſs a fair creditor. Many deciſions have been pronounced upon theſe principles. Thus though the denunciation of appriſing makes the ſubject litigious, after which the debtor cannot make any voluntary alienation to the prejudice of the appriſing; yet if the appriſer does not proceed in his diligence, the effect of the litigiouſneſs ceaſes; 23d *July* 1674, *Johnſton*. So, in the ſame manner, where a debtor had diſponed his lands after leading the appriſing, but before infeftment, the court refuſed to reduce the diſpoſition, in reſpect that ſix years had intervened betwixt the appriſing and infeftment; 21ſt *July* 1627, *Macculloch*. Now, in the preſent caſe, the proceſs was allowed to ſleep for nine years; and it was during this period that one of the heritable creditors lent his money, that the diſpoſition to the whole of the creditors was executed by *Gilleſpie*, and the eſtate again ſold by their truſtee to *Macharg*, at a public roup, without any challenge whatever.

Anſwered for the purſuer, to the *firſt* defence, Beſides that it is believed the *actio quanti minoris* does not take place in this country, nor in the law of any modern nation, it could not apply to this caſe, tho' it were to be judged by the *Roman* law; for that action was only competent againſt the ſeller, who had, without fraud, ſold a defective ſubject at a higher price than the buyer would have given if he had known the defect. But where fraud intervened, there was no place for this action. And as, in the preſent caſe, the ſeller was fraudulently induced to ſell at an undervalue, ſhe and her repreſentatives are intitled to be put in the ſame caſe as if ſhe had not fallen into the ſnare that was laid for her; and it would be againſt juſtice, to allow the deceiver to take any profit ariſing from his fraud, whether it lies in the difference of the value of the ſubject at the time, or in a higher value that may afterwards accrue to it.

To the *ſecond*, 1*mo*, The firſt heritable bond was granted by *Gilleſpie* before the proceſs was allowed to ſleep, and at a time when he was granting tacks, with this exception from the warrandice, That if the lands were evicted, then the tacks ſhould be void and null. The other heritable creditor alſo advanced his money before the proceſs ſlept; for it was lent at *Candlemas* 1749, and the cauſe had been called upon the 2d of *February* 1748; and the purchaſer was fully certiorated of the purſuer's claim to the lands, not only by the proceſs of reduction, but alſo by the above-mentioned exception from the warrandice in the tacks. There is no pretence therefore for making him a *bona fide* purchaſer upon the faith of the records. 2*do*, By the laws of all countries, a real action which concludes, that the defender's right be reduced, and the purſuer's declared, interpels the defender from making an alienation *judicii mutandi cauſa*, and third parties from dealing with him. The decree declares the right as it ſtood at the commencement of the action; and

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no intermediate act of the defender can prejudice it. Nor is this any infringement upon the ſecurity intended to be given by the records. They give a rational ſecurity to purchaſers; but the law does not intend that purchaſers ſhould keep their eyes ſhut againſt every thing elſe that paſſes before them. Neither can any argument be drawn in favour of the defenders in this caſe, from the two deciſions quoted by them. For, not to mention, that, by a later deciſion, *viz.* 8th *December* 1736, *Walle contra Barclay*, adjudications have been found to have the privilege of litigioſity, though they have lain over for nine years without infeftment; the caſes referred to proceed upon principles not applicable to the preſent. A denunciation of appriſing, or ſummons of adjudication, is only a temporary bar or interpellation againſt dealing with the debtor, becauſe the decreet itſelf is no more: and the reaſon of both is, that being only ſteps of diligence intended for recovering payment of a debt, though the debtor cannot *in curſu* diſappoint them, yet if the creditor deſert his diligence for a conſiderable tract of time, the debtor is releaſed from the fetter, as it is naturally to be preſumed, that the creditor has operated his payment ſome other way. But this will not apply to a real action, or reduction of a real right. The decree obtained upon ſuch action is perpetual, though the obtainer of it ſhould not inſiſt for poſſeſſion till the approach of the long preſcription; and as the decreet is perpetual, ſo the action muſt have its full effect as long as it depends in court: and though the dependence ſhould be intermitted for years, yet as the proceſs is ſtill in court, and may be wakened by either party *ad libitum*, the decreet which paſſes upon it being declaratory, will have effect from the ſummons, and will exclude any intermediate deeds of the defender.

"The Lords refuſed the deſire of the petition, and adhered." 1. c.

Act. *Menzies, Jo. Craigie, Ferguſon.* Alt. *Wight, Advocatus, Lockhart.* Clerk, *Juſtice.*

N° CCXI. 22d *January* 1760.

JOHN BRYSON of *Hartfield*,

AGAINST

ROBERT CHAPMAN writer in *Glaſgow*, and ROBERT BARRIE weaver in *Hamilton*.

A tailzie not irritating the contravener's right, though inhibition be uſed upon it, does not bar a ſale.

IN 1716, *John Bryſon* and *John Chapman* executed a mutual tailzie, whereby they diſponed to themſelves, and the heirs of their bodies, whom failing, to each other, and the heirs of their reſpective bodies, certain tenements in *Glaſgow*, under ſtrict prohibitory clauſes againſt contracting debt upon the ſubject, or *ſelling* or alienating the ſame, and an irritancy of all deeds done to the contrary.

Upon this tailzie no infeftment followed, nor was it recorded in

terms of the act 1685; but in 1735, inhibition was executed upon it, at the inſtance of *Chapman* againſt *Bryſon*.

In 1757, the ſaid *John Bryſon* entered into a minute of ſale with *Robert Barrie*, whereby he bound himſelf to ſell to *Barrie*, for a certain price, the ſaid ſubjects belonging to him, and contained in the entail.

Barrie ſuſpended the minute on this ground, That *Bryſon* could not effectually convey the lands to him, in reſpect of his being bound by the entail not to ſell. *Robert Chapman*, the ſon of the other tailzier, and, by the tailzie, third in ſucceſſion to *Bryſon*, appeared for his intereſt, in ſupport of the reaſons of ſuſpenſion.

Objected for *Bryſon* to the tailzie, That it could not be any bar to a ſale, as it was not recorded, nor completed by infeftment, and eſpecially as it does not contain any reſolutive clauſe of the contravener's right. No man can ſo ſettle his eſtate under prohibitive and irritant clauſes, that the deeds of contravention ſhall be annulled, without at the ſame time annulling the contravener's right, upon this plain principle, That if the eſtate remains with him, it muſt be ſubject to his debts and deeds.

Anſwered for *Chapman*, 1*mo*, As the entail remains a perſonal deed, a purchaſer can only take the right as *Bryſon* himſelf has it; and therefore muſt be barred by the prohibitory clauſes binding upon him, as contained *in gremio* of the only title which he has to the lands, agreeable to what was found in the laſt reſort, in the caſe of *Weſtſhiel*. *Res eſt integra*, and the purchaſer is not *in bona fide* to accept of the ſale, when he ſees the limitations. 2*do*, At any rate, the tailzie is ſecured by the inhibition. When a man obliges himſelf not to ſell land to the prejudice of another, and inhibition follows on that obligation, it follows, that he cannot ſell contrary to ſuch obligation.

Replied for *Bryſon*, 1*mo*, Purchaſers are *in bona fide* to buy where they ſee no legal impediment, and are ſuppoſed to know that the law gives no authority to limitations upon property, ſo as to irritate the acts of contravention, without reſolving the contravener's right; which therefore diſtinguiſhes this caſe from that of *Weſtſhiel*, where the prohibition was inforced by both irritant and reſolutive clauſes. 2*do*, The inhibition can never ſupply the defect in the right itſelf. It may ſecure the right *tantum et tale* as it is, but cannot render it more obligatory or effectual than the law has made it.

"The Lords repelled the reaſons of ſuſpenſion, and found the letters orderly proceeded."

D. R.

For *Bryſon*, *Hamilton-Gordon*, *Lockhart*. Alt *John Dalrymple*. Reporter, *Woodhall*. Clerk, *Gibſon*.

N° CCXII.

N° CCXII. 5th *February* 1760.

DANIEL CAMPBELL of *Shawfield*, and WILLIAM GRAHAM of *Gartmore*,

AGAINST

WILLIAM MUIR of *Caldwall*.

Not competent to a meeting of freeholders to reject a claimant's title, on account of his author's being barred from disponing by a strict entail.—Meaning of the act, allowing entailed superiorities to be sold to the vassals.—Import of the objection, of nominal and fictitious.—Crown-charter, containing a joint reddendo *for different parcels of lands, may be divided without consent of the crown.—Certificate under the hands of two commissioners of supply, and their clerk, is sufficient evidence of the valuation to a meeting of freeholders; and it is enough, if the decreet of division is finished any time before the meeting.*

Boyd Porterfield of that Ilk was vassal to the Earl of *Glencairn* in the lands of *Nullishill*, *Giblston*, and others, in the shire of *Renfrew*.

The Earl disponed the superiority of these lands, in 1757, to his vassal; and upon the procuratory in that disposition Mr *Porterfield* expeded a charter under the great seal: but immediately thereafter, and without taking infeftment on the charter, Mr *Porterfield* disponed the superiority of one part of these lands to *Daniel Campbell* of *Shawfield* in liferent, and to Lord *Glencairn*, and his heirs, in fee, containing an assignation to the charter, and precept of seisin therein, so far as related to that part of the lands; and he, at the same time, disponed the other part of the said lands to *William Graham* younger of *Gartmore* in liferent, and Lord *Glencairn*, and his heirs, in fee, containing the like assignation.

Mess. *Campbell* and *Graham* having obtained themselves infeft on their dispositions; and their several proportions of the said lands being ascertained, by the commissioners of supply of the county, to be upwards of *L.* 400 *Scots* of valued rent, they both entered their claims to be inrolled in the roll of freeholders of that county, at the *Michaelmas* meeting 1759.——Mr *Muir* of *Caldwall* stated sundry objections to the titles produced by them; and these objections were sustained by a majority of the meeting; upon which they complained to the court of session.

Objected by Mr *Muir*, 1*mo*, The superiorities in question are part of the entailed estate of *Glencairn*; and the Earl is, by the tailzie, which stands on record, laid under an express prohibition to sell or alienate any part of the tailzied estate, with the usual irritant and resolutive clauses: so that the Earl was disqualified from granting, and the claimants from acquiring, that right under which they claim. Neither can they take any benefit from that clause in the late statute abolishing ward-

ward-holdings, whereby ſuperiors poſſeſſed of entailed eſtates, are allowed to convey their entailed ſuperiorities to their vaſſals: for it appears from the preamble of the ſtatute, that the object which the legiſlature had in view, was, " the enfranchiſing of vaſſals of ſubject-" ſuperiors, by cauſing them to become immediate vaſſals of the " crown;" which was looked on as a matter of public benefit: And therefore it is enacted, " That it ſhall be lawful to any perſon poſſeſſed " of an entailed eſtate, to ſell to his vaſſal the ſuperiority of his own " lands, and thereupon to reſign ſuch lands for *new infeſtment* to be " granted to the vaſſal." No ſale or tranſmiſſion of any ſuperiority by an heir of entail can be good, unleſs it is executed in terms of this ſtatute, and agreeable to the ſpirit and intention of it. In the preſent caſe, the ſuperiorities of Mr *Porterfield*'s lands were not ſold and conveyed to him, in order to enfranchiſe and render him the vaſſal of the crown; but, on the contrary, the evident and ſole purpoſe of the whole tranſaction, was to ſubſtitute ſeveral ſuperiors over Mr *Porterfield*'s eſtate, in place of the Earl of *Glencairn*; and though the diſpoſition was made to Mr *Porterfield* in the firſt place, in order to ſave appearances, it is plain, that the ſuperiority was not intended to remain with him, as he immediately thereafter reconveyed it to two of my Lord's nephews in liferent, and to the Earl himſelf in fee; and Mr *Porterfield* did not ſo much as take infeftment on his charter, which the act of parliament ſeems to require.

2*do*, Mr *Porterfield*, the vaſſal, holds the property of theſe very lands under a ſtrict entail; and therefore ſuppoſing the ſuperiority to have been properly conveyed to him, in terms of the ſtatute aboliſhing ward-holdings, it was not in his power afterwards to ſplit that ſuperiority, whereby to create a burden and ſervitude upon his tailzied eſtate, contrary to the prohibitions of the entail, as well as to the plain meaning and intention of the ſtatute.

3*tio*, The qualifications of theſe claimants are plainly nominal and fictitious, and, by act 7th of *Geo.* II. cannot intitle to a vote.

4*to*, As the charter from the crown granted to *Boyd Porterfield* contained one joint *reddendo* for the whole lands ſeparately conveyed to the two claimants, it was not in Mr *Porterfield*'s power, by aſſigning away the precept, to ſplit or divide this right, without conſent of the crown.

5*to*, The claimants had produced only a certificate of their valuation under the hands of two commiſſioners of ſupply, and their clerk; whereas the whole proceedings of the commiſſioners, in making the valuation, ought to be produced, in order that it may appear with certainty, whether the valuation is rightly aſcertained. And, *ſeparatim*, the diviſion was completed long ſubſequent to the date of the claims, and therefore cannot be founded on; becauſe the claim ought to ſet forth the whole titles and other documents neceſſary to inſtruct it.

Anſwered by the claimants: To the *firſt* objection, It is *jus tertii* to the meeting of freeholders, to move this objection founded on the tailzie of *Glencairn*. If Lord *Glencairn* has contravened the prohibitions of that entail, it is competent only to the heirs of tailzie to take advantage of ſuch contravention. A conveyance granted by an heir of tailzie, however ſtrictly bound down, is good againſt every mortal but the heirs ſubſtituted in that tailzie, who may either challenge or not

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as they think proper; and if they chuſe to acquieſce, no third party has a title to complain. Far leſs can a meeting of freeholders ſtir ſuch objections. All that they are to inquire into is, whether lands of the holding and valuation required by law are veſted in the claimant by charter and ſeiſin? and, whether the claimant is in poſſeſſion of the right under which he claims? But they have no title to inquire into objections, or grounds of reduction, which may be competent to heirs of entail, creditors, or other third parties.

Beſides, there is no relevancy in the objection: for the ſuperiorities in queſtion were ſold by Lord *Glencairn* to Mr *Porterfield* in the preciſe terms of the act aboliſhing ward-holdings, which allows the poſſeſſors of entailed ſuperiorities to ſell them to their vaſſals, upon ſecuring the price for behoof of the heirs of entail. It may be very true, that the chief object of the legiſlature, in giving that allowance, was the infranchiſement of the vaſſal: but after having once purchaſed the ſuperiority, the law has left him at abſolute liberty either to retain or diſpoſe of it at pleaſure. Neither is it neceſſary that infeftment ſhould in the firſt place be taken in the perſon of the vaſſal. This would anſwer no other purpoſe but to increaſe expence. The law only ſays, that the ſuperior may reſign the lands in favour of the vaſſal for new infeftment; but the diſpoſition and procuratory to be granted to him, is not limited to his perſon, ſo as not to be tranſmiſſible to heirs or aſſignees. If he dies after receiving a diſpoſition, his heir may make up a title to it, and expede the charter and infeftment; ſo may his aſſignee, if he thinks fit to aſſign it.

To the *ſecond* objection; It was equally incompetent, and *jus tertii*, to the meeting of freeholders, to found any objection upon the tailzie of Mr *Porterfield* the vaſſal. And the objection itſelf is irrelevant: for ſuppoſing the property to be entailed, the ſuperiority afterwards acquired cannot be brought under the fetters of that entail, without ſome poſitive act or deed to that purpoſe. The heirs of entail had no *jus quæſitum* to the ſuperiority; and therefore Mr *Porterfield* was at full liberty to diſpoſe of it.

To the *third* objection; The titles of the claimants are neither nominal nor fictitious; each of them has a true and real eſtate, which he may diſpoſe of at pleaſure, and which may be attached for his debts. They are intitled to the rents, profits, and emoluments of their ſeveral eſtates during their lives. They are under no promiſe or backbond, nor do they hold theſe ſuperiorities in truſt for any perſon whatever. It is no objection to any claimant, That his chief view in purchaſing the right under which he claims, was to intitle him to the valuable privilege of voting for a member of parliament, unleſs it can alſo be proved, that his right is nominal and fictitious, *i. e.* not a real eſtate in him, but held in truſt for ſome other perſon. Neither does the law make any diſtinction, whether a ſuperiority yields more or leſs profit to the ſuperior. If the lands are held of him, though for payment only of a blanch duty of two pennies, he is ſtill the only vaſſal of the crown in theſe lands, and as ſuch intitled to a vote, if the lands be of the valuation required by law.

The *fourth* objection is equally ill founded. When the crown, or other ſuperior, grants a precept to aſſignees, this implies a conſent on the part of the ſuperior, to the grantee's diſpoſing of the lands in

whole or in part; and consequently to his assigning the charter, and precept, as relative thereto, in favour of third parties. Nor is the superior thereby prejudiced; for the whole lands, and every part thereof, are still liable in payment of the whole *Reddendo*, however split among the different purchasers.

As to the *fifth* objection, The division of the valuation was made at a general meeting of the commissioners, upon a proof adduced before their committee, reported to them. The decreet of division is produced in process, and a certificate was laid before the *Michaelmas* meeting, of the amount of the valuation stated in the books conform thereto, which is all that is usually done. It is unnecessary to lay the proceedings of the commissioners before the meeting: for it has been found, that the freeholders have no power to canvass or review these proceedings. Neither is it any objection, That the decreet of division was not quite finished when the claim was lodged; as it was in fact finished long before the *Michaelmas* meeting.

"The Lords repelled the objections offered to the titles produced for "the claimants, and ordained them to be added to the roll."

I. C.

Act. *Lockhart* and *Ferguson*. Alt. Lord Advocate.

N° CCXIII. 13th *February* 1760.

SUSANNA OGILVY,

AGAINST

His MAJESTY's ADVOCATE.

A decreet-dative in favour of a nearest of kin, without confirmation, not a sufficient title to convey.

John Farquharson was proprietor of the lands of *Monaltry* and *Craigmyle*. He sold the lands of *Craigmyle*; and, at his death, the greatest part of the price remained in the hands of the purchaser.

John Farquharson died without issue-male, leaving a daughter, *Anne Farquharson*.

The lands of *Monaltry*, being a male fee, by the death of *John Farquharson* devolved upon his brother *Francis*; who being convicted of high treason, the lands were surveyed as forfeited, in terms of the vesting act.

Anne Farquharson was decerned executrix to her father by the commissary of *Aberdeen*; but died before the confirmation was expede, having made a deed in favour of *Susanna Ogilvy*.

After the death of *Anne Farquharson*, the price of *Craigmyle* was also surveyed, as falling under the forfeiture of *Francis Farquharson*.

A claim was entered for *Susanna Ogilvy*, as having right to the price of *Craigmyle*, in virtue of *Anne Farquharson*'s deed in her favour.

Objected for his Majesty's advocate, That the subject in question was never vested in *Anne Farquharson*; and therefore could not be carried by her

her deed to the claimant. The only right in the perſon of *Anne Farquharſon* was the decerniture in her favour, which, without confirmation, did veſt nothing.

An *ipſo jure* tranſmiſſion of property from the dead to the living, is unknown in the law of *Scotland*. Certain titles are neceſſary to veſt in the heir the ſubjects which belonged to his predeceſſor, whether theſe ſubjects be heritable or moveable. The title neceſſary in moveable ſubjects is confirmation. A ſimple decerniture veſts no right; it only declares, that the perſon decerned has a title to be confirmed, in the ſame way as a ſpecial ſervice points out the perſon who is intitled to take up the lands belonging to the defunct: but it is the infeftment that veſts the lands in the perſon of the heir. If he dies without infeftment, the ſpecial ſervice falls to the ground.

This doctrine is laid down by all the writers on our law, and ſupported by the deciſions. There is a late one directly in point, 23d *January* 1745, *Carmichaels* againſt *Carmichael*.

Anſwered for the claimant, The price of *Craigmyle* was a moveable ſubject, *in bonis* of *John Farquharſon* at the time of his death. At his death, the right devolved upon his daughter *Anne Farquharſon*, without the neceſſity of any title. The office of executor may indeed require a title; but the right of the neareſt of kin to the ſubjects of the executry requires none. It is eſtabliſhed *jure ſanguinis*, and needs no form of law to complete it.

This is agreeable to the principles of the *Roman* law, by which the *aditio hereditatis*, which correſponds to our making up of titles, was not required of *ſui heredes*, who ſucceeded by right of blood, *et hereditatem ipſo jure adquirebant. l.* 3. *Inſt. de hered. quæ ab inteſt.* And as the right veſted in them without titles, ſo they tranſmitted the ſame to their heirs: *Hereditatem etiam non aditam ad heredes tranſmittebant, l.* 3. *C. de jure delib.*

The claimant's plea is ſupported by the deciſion in the caſe of *Macwhitter*, 14th *November* 1744, where it was found, That a neareſt of kin, who attains poſſeſſion of the moveables of a defunct, does tranſmit the ſame to his own neareſt of kin, though he ſhould die without making up any title. This proves, that his right is complete without a title, ſince it enables him not only to take poſſeſſion of the ſubjects, but to tranſmit them: for ſurely, unleſs he had a previous right, intromiſſion with the ſubjects could not veſt any in him, nor tranſmit any to his executors; as in the caſe of heirſhip-moveables which belong to the heir of line, upon his making up a title by ſervice; but if he ſhould die without being ſerved, although he had got poſſeſſion of the heirſhip-moveables, he would not tranſmit them to his heir, but they would go to the next heir of the firſt defunct.

Suppoſing a title was neceſſary, the decreet-dative in favour of *Anne Farquharſon* would be ſufficient. When a neareſt of kin has declared an intention to take up the predeceſſor's moveable ſucceſſion, and has proceeded ſo far as to be decerned executor, his right is ſo eſtabliſhed by the decerniture, that he may tranſmit or convey that ſucceſſion. A partial confirmation of a neareſt in kin is ſufficient to tranſmit the whole executry to his neareſt of kin or creditors; but where the confirmation is only partial, the ſubjects not confirmed are in the ſame caſe as if there had been no confirmation: it can therefore only be in virtue of the

the decreet-dative that ſuch ſubjects, not confirmed, are tranſmitted.

The claimant's caſe is highly favourable, that this ſucceſſion ſhould not be ſwept away by the forfeiture of a collateral, who had no right to it at the time he committed the treaſon.

"The Lords found, That the claimant had no right to the executry "of *John Farquharſon*, in reſpect her cedent *Anne Farquharſon* had "neither made up titles by confirmation to the ſaid *John Farquhar-* "*ſon*, nor attained poſſeſſion of his moveables before her death."

W. N.

For the claimant, *Nairne*. Alt. *Macqueen*. Reporter, *Colſton*. Clerk, *Gibſon*.

N° CCXIV. 23d *February* 1760.

JOHN TENNENT,

AGAINST

ROBERT TENNENT.

Warning, if neceſſary againſt the repreſentatives of a tenant who had a tack for all the days of her life?

John Tennent of *Weſter Inch*, granted a tack of part of his lands called *the Glebe*, worth about 200 merks a-year, to *Jean Tennent*, his couſin and houſekeeper, *during all the days of her life*, for the yearly rent of one merk *Scots*; and he bound *John Tennent* his heir, by a diſpoſition of the eſtate in his favour, to maintain her in poſſeſſion of this farm, and to plough and labour it for her.

John Tennent, the granter of the tack, died in 1740; and *Jean Tennent* entered into poſſeſſion, and peaceably enjoyed *the Glebe*, at the eluſory tack-duty, till her death, which happened about the beginning of *January* 1756. *John Tennent* now of *Weſter Inch*, immediately thereupon took poſſeſſion of the farm without any warning, ploughed and ſowed it, and reaped the crop, though a proteſt was taken againſt him in the name of *Robert Tennent*, brother and heir to *Jean*, That he could not be deprived of the farm without a warning.

Robert Tennent brought a proceſs againſt *John*, for having it found, That he, as heir to *Jean*, had right to continue the poſſeſſion of the lands until removed therefrom by a legal warning; and therefore concluding for the price of the crop, damages, *&c.*

Pleaded for the purſuer, That by the ſtatute 1555, it is enacted, That tenants cannot be removed from their farms without a legal warning, that they may have time to be provided in new habitations. This is a general rule, and takes place in all tacks. A tack granted by a liferenter, is effectual to protect the tenant from removing on the liferenter's death without a warning: by analogy of law, a liferent-tack ſet by the proprietor muſt be effectual to protect the heir of the liferenter from removing without warning.

The heir of the liferent-tenant has right to poſſeſs without making up any titles; and therefore muſt continue the poſſeſſion till he is legally

gally warned to remove. Nor can it make any difference, that the rent is ſmall: for otherwiſe a tenant might be ſummarily turned out whenever he does not pay a rent adequate to the ſubject poſſeſſed.

Anſwered for the defender, That warning is only neceſſary to prevent tacit relocation. The heritor thereby intimates to the party in poſſeſſion, that he muſt remove: it is therefore only neceſſary, when one is in the lawful poſſeſſion. A tenant who has enjoyed his farm during the tack, is lawfully in poſſeſſion; and therefore, though it is at an end, he may continue on the ſame conditions till he is legally warned; and after his death, his heir, who is *eadem perſona cum defuncto*, may maintain the poſſeſſion. But in a liferent-tack, the caſe is very different. Then the duration of the tack is expreſsly limited to the tenant's life. His heir cannot ſucceed. In ſuch a tack, the defunct has no heir; becauſe he is directly excluded: Though therefore the heir ſhould enter into poſſeſſion after the tenant's death, he poſſeſſes without a title; and therefore cannot plead tacit relocation.

Suppoſe *Jean Tennent* had paid a high rent for the farm, and after her death, her heir, inſtead of entering into poſſeſſion, had left the farm unoccupied; he could not have been found liable for the rent. It would have been a good defence, That the tack was limited to the life of his predeceſſor, and that he was not intitled to poſſeſs. If no renunciation was neceſſary on his part, neither was a warning neceſſary, on the part of the proprietor, to remove him from the farm.

Whatever may be the law when the tenant pays an adequate tack-duty, the caſe is very different here, where the rent is one merk inſtead of 200, which is the real value of the farm. This can by no means be looked upon as a tack, but rather as a right of liferent. *Jean Tennent* poſſeſſed the liferented lands herſelf; and therefore, as ſhe died before the crop was ſown, her executor had nothing to claim; and as the liferenter's right was totally at an end by her death, the fiar might enter into poſſeſſion without the neceſſity of a warning.

"The Lords found, That there was no neceſſity for a warning in "this caſe; and therefore aſſoilzied, and decerned." P. M.

Act. *Ja. Dundas.* Alt. *Macqueen.* Clerk, *Juſtice.*

N°CCXV. 22d *February* 1760.

LAUCHLAN GRANT of *Drumphad*,

AGAINST

FREDERICK CAMPBELL, Esq; and other FREEHOLDERS of *Dumbartonshire*.

1. *A title is not held to be* nominal *or* fictitious, *where the claimant truly possesses the whole right granted to him by the deed.*—— 2. *Wadset of a superiority, where the feu-duty payable to the wadsetter was precisely equal to the interest of the redemption-money, found a proper wadset.* —— 3. *Disponee, after executing the procuratory in his disposition, and taking out a charter from the crown, may still take infestment upon the precept in the disposition.*—— 4. *He may assign the precept in the crown-charter to several different persons.*

SIR *James Colquhoun* of *Luss*, having purchased the five-merk land of *Drumphad*, in the county of *Dumbarton*, from the Lord *Cathcart*, obtained a charter under the great seal, of these and other lands; after which *Lauchlan Grant* writer in *Edinburgh* acquired a freehold upon them in the following manner.

Sir *James*, after taking out his charter, obtained himself infeft in the lands, upon a special procuratory granted by him to take infeftment in his name upon the precept *de me* in Lord *Cathcart*'s disposition.

He next granted a feu-charter of the lands of *Drumphad* to *Charles Crawford*, (supposed to be a trustee for Sir *James*), for payment of a yearly feu-duty of 16*s.* 8*d. Sterling*; upon which *Crawford* was infeft upon the 23d *March* 1758.

The property of the lands being thus separated from the superiority, Sir *James*, upon the 24th *March* 1758, entered into a contract of wadset with *Lauchlan Grant*, whereby he wadsetted to him the lands of *Drumphad*, under the exception of *Charles Crawford*'s feu-right, redeemable at the term of *Martinmas* 1763, for *L.* 16 : 13 : 4; the legal interest of which sum exactly corresponded with the yearly feu-duty levyable by the wadsetter. Sir *James*, at the same time, assigned to Mr *Grant* so much of the precept of seisin in his own charter from the crown as corresponded to the lands of *Drumphad*; and as it still remained to take Sir *James*'s base infeftment out of the way, so as to bring *Crawford*'s sub-feu to be held immediately under the wadsetter, Sir *James*, in order to accomplish this, resigned the lands, *ad perpetuam remanentiam*, in the hands of *Lauchlan Grant*; and the base right being thus consolidated with *Grant*'s right of superiority, *Grant*, in the next place, obtained himself infeft upon the precept in Sir *James*'s crown-charter, and assignment thereto.

Lauchlan Grant having claimed to be inrolled upon these titles at the *Michaelmas* head-court held at *Dumbarton* in *October* 1759, his claim was objected to; and the objections having been sustained by a majority of the freeholders, Mr *Grant* complained to the court of session.

Pleaded for the defenders, 1*mo*, The titles produced by the complainer

plainer carry evident marks of a nominal and fictitious qualification, created with the ſole view of making a vote at an election, without intending to confer any ſubſtantial intereſt in the land. Had a real purchaſe been intended, the parties would never have gone about it in the manner they have done. Mr *Grant* has made no real acquiſition, but has only lent his name to create a vote. He has acquired the ſubject, not for his own behoof, but to ſerve his author: and though it may be true, that he is under no poſitive engagement to Sir *James Colquhoun*; yet he is, from the nature of the thing, under a tacit and implied obligation, which is equally binding in conſcience. It was plainly with a view to guard againſt practices of this ſort, that the oath required by the 7th of King *George* II. was introduced. It is not enough that the perſon claiming to vote has given no promiſe nor backbond, directly nor indirectly: he muſt likewiſe be able to ſay, "That his title is "not *nominal or fictitious, created or reſerved* in him in order to enable "him to vote at an election; but that the ſame is *a true and real eſtate* "in him for his own uſe and benefit," *&c.* It is plain, therefore, that the legiſlature reprobates all ſuch nominal votes; and if the court is ſatisfied, from the face of the deeds, and the nature of the tranſaction, that the complainer's title falls under that deſcription, it is the ſame thing as if Mr *Grant* had acknowledged, upon oath, that his qualification was nominal and fictitious.

2do, The defenders apprehend, that the right upon which the complainer's claim is founded, is not a *proper wadſet*, in the meaning of the acts 1661 and 1681, which declare, that proper wadſetters, having lands of the holding, extent, or valuation required by law, ſhall have right to vote. Wadſets of ſuperiority diſtinct from the property, are a modern invention, and could not be in the view of the legiſlature at that time. In the act 1661, *c.* 62. a proper wadſetter is deſcribed, "as taking the hazard of the fruits, tenants, war, or trouble;" but a wadſetter of naked ſuperiority cannot poſſibly run any ſuch hazards. Such a wadſet, therefore, is more nearly allied to the improper kind; if indeed the terms *proper* and *improper* can at all apply to wadſets of ſuperiority. In the preſent caſe, the complainer is ſecured in a feu-duty preciſely equivalent to the intereſt of his money; he runs no riſks; and he is much in the ſame caſe with a wadſetter who holds the lands at a certain rent, or who grants a back-tack to the reverſer for a tack-duty equal to the legal intereſt of his money: in both of which caſes the wadſet becomes *improper*. Neither is there any chance for the falling of caſualties before the time at which the wadſet is redeemable; and though there were, it is not every minute and trifling inequality that is ſufficient to render a wadſet *proper*; as was found in the caſe of *Doul* againſt creditors of *Young*, 18th *July* 1718, *Home*'s Select Deciſions.

3tio, It was irregular in Sir *James Colquhoun*, after the lands were reſigned in the crown's hands, the reſignation accepted of, and in conſequence thereof a charter of reſignation granted by the crown in his favour, to ſtop ſhort, and in place of executing the precept in that charter, to go back upon Lord *Cathcart*'s diſpoſition, and grant a ſpecial procuratory to take infeftment upon the precept *de me* therein contained.

Laſtly, It was improper in Sir *James Colquhoun* to aſſign away and divide

vide the precept in the crown-charter among two or three different people, ſo as thereby to obtrude ſeveral vaſſals upon the crown, in place of one. It has been found, that a vaſſal could not have three ſuperiors in place of one obtruded upon him; and there is no reaſon why a ſuperior ſhould not be equally a favourite of the law.

Anſwered for *Lauchlan Grant*: To the *firſt* objection, That a title cannot be nominal or fictitious, where the claimant is truly poſſeſſed of the whole right that is ſet forth in the writings produced. Here the complainer poſſeſſes the lands with the burden of Mr *Crawford*'s feu-right; he uplifts the feu-duties; he is intitled to uplift the caſualties when they fall; and he is under no obligation to account for the ſame to any perſon. The whole right, ſuch as it appears from his titles, is fully and truly in him, for his own behoof, without any promiſe or obligation to the contrary; and conſequently it is a *true* and *real* eſtate in him, *for his own uſe* and benefit, and for the uſe of no other perſon whatſoever, in terms of the ſtatute referred to in the objection.

Anſwered to the *ſecond* objection, It does not alter the nature of an improper wadſet, that the rent is certain and well paid, which may happen in lands poſſeſſed by good tenants, as well as when they are held of the wadſetter in feu. It is ſtill a proper ſale during the not-redemption. If any alteration happen in the intereſt of money, it affects the reverſer, who has the price in his hands. And, *è contra*, whatever alteration happens as to the lands, by the falling of caſualties, or ſuperveniency of burdens, theſe affect the wadſetter, who is purchaſer as long as the right is not redeemed. Wadſets of ſuperiority have always been ſuſtained as good titles for a qualification, when the lands amount to the extent or valuation required by law.

In anſwer to the *third* objection, Sir *James* had it in his power to take infeftment, either in the one way or the other, as the feudal right was ſtill in Lord *Cathcart*.

And in anſwer to the *fourth* objection, When the crown, or any other ſuperior, grants a charter to a vaſſal, and his heirs or aſſignees, of the lands *A*, *B*, and *C*; as the vaſſal may take infeftment of the lands of *A* only, ſo, if he thinks fit, he may diſpone theſe lands to a purchaſer, or a creditor may adjudge them from him, without acquiring right to the other lands; and he may afterwards ſell the reſt of the lands to another purchaſer; nor can the ſuperior refuſe to receive theſe purchaſers or adjudgers.

"The Lords found, That the complainer had a good title, and appointed him to be inrolled." P. M.

For the complainer, *Ferguſon*. Alt. *Ilay Campbell*. Clerk, *Kirkpatrick*.

N° CCXVI. 23d *February* 1760.

Mr ADAM ROSE Petitioner.

After decreet no ſummary complaint competent.

A Petition was preſented to the court by Mr *Adam Roſe*, miniſter of the goſpel at *Dingwall*, ſetting forth, That, in *April* 1759, he was

was examined as a witneſs at *Dingwall*, in the complaint at the inſtance of *Mackenzie* of *Brae*, againſt Colonel *Scot* and others; and complaining, That after he had emitted his depoſition, Sir *William Dunbar* of *Hemprigs* uſed many injurious and indecent expreſſions with regard to his oath, charging him in pretty direct terms with perjury. And he prayed, That the complaint might be ſerved, and Sir *William* found liable in damages and expences.

"The Lords found this ſummar complaint not competent, in regard "the principal cauſe was determined, and out of court." P. M.

N° CCXVII. 27th *February* 1760.

WILLIAM EARL of MARCH,

AGAINST

Sir THOMAS KENNEDY of *Culzean*, Baronet.

An entailed eſtate becomes an unlimited fee in the perſon of the laſt ſubſtitute, when, failing him, it devolves upon heirs whatſoever.

John Lord *Kennedy*, in the year 1697, married *Eliſabeth Hutchiſon* of the county of *Nottingham*. Upon this occaſion, articles of agreement were entered into betwixt Lord *Kennedy*, with conſent of his father *John* Earl of *Caſſilis*, and the ſaid *Eliſabeth Hutchiſon*, by which theſe Lords bound themſelves to provide lands, of the yearly value of *L.* 1000 *Sterling* to the ſaid Lord *Kennedy*, and the heirs-male of his body, in ſuch manner as that it ſhould not be in the power of any of them to hinder theſe lands from devolving in that way, or to ſell or alienate them, or to contract debts whereby the ſame might be incumbered or evicted. It was further provided, That in caſe, upon failure of heirs-male of the body of Lord *Kennedy*, the lands ſhould come to his father the Earl of *Caſſilis*, it ſhould be in his power to diſpone or burden them as he thought proper; ſubject always to the payment of certain portions provided to the daughters of the marriage.

In implement of theſe articles, a poſtnuptial contract of marriage was executed in 1698, by which the lands were provided to *John* Earl of *Caſſilis* in liferent, and to *John* Lord *Kennedy* in fee, and the heirs-male of his body; whom failing, to the heirs-male of the Earl's body; whom failing, to a number of other ſubſtitutes; whom all failing, to any perſon whom the Earl of *Caſſilis* ſhould appoint by a writing under his hand; whom failing, to any perſon who ſhould be ſo nominated by Lord *Kennedy*; whom all failing, to Lord *Kennedy* his heirs and aſſignees whatſoever: and upon this deed a charter was taken out, and the parties were infeft.

John Earl of *Caſſilis*, the only ſon of the marriage, was infeft upon this contract. As he had no children, and as all the other ſubſtitutes in the contract of marriage had failed, the eſtate, upon his death, would have devolved to the heirs whatſoever of his father Lord *Kennedy*. In this ſituation, upon the 29th *March* 1759, he executed a deed of entail, by which he provided the eſtate to himſelf, and the heirs of his

body; whom failing, to Sir *Thomas Kennedy* of *Culzean*, his neareſt heir-male, and to the heirs-male of his body; whom failing, to certain other ſubſtitutes; under prohibitive, irritant, and reſolutive clauſes.

John Earl of *Caſſilis* having died in 1759, without iſſue, the Earl of *March*, as neareſt heir whatſoever of *John* Lord *Kennedy*, took out brieves for ſerving himſelf heir in ſpecial to the late Earl, in virtue of the charter and infeftment which paſſed upon Lord *Kennedy*'s contract of marriage. This ſervice was oppoſed by Sir *Thomas Kennedy* before the macers, and the cauſe was taken to report by the Lords aſſeſſors; and Lord *March*, at the ſame time, brought a proceſs for reducing the diſpoſition in favour of Sir *Thomas*.

The relation in which Lord *March* ſtood to the family of *Caſſilis* was as follows. *John* Lord *Kennedy* had an only ſiſter, Lady *Anne*, who was married to *John* Earl of *Selkirk* and *Ruglen*. By him ſhe had two daughters; Lady *Anne*, mother to the Earl of *March*; and Lady *Suſan*, widow of the deceaſed Earl of *Caſſilis*.

Pleaded for the Earl of *March*, The contract 1698 is a ſtrict entail, fenced with prohibitive, irritant, and reſolutive clauſes againſt contracting debt, or altering the ſucceſſion. After a number of other ſubſtitutes, the entailer calls expreſsly the heirs-female of Lord *Kennedy*, under the deſcription of his *heirs whatſoever*. Though he preferred his heirs-male, yet it was undoubtedly his will and intention, that, upon failure of them, his heirs-female ſhould ſucceed. They are plainly called as members or branches of the ſubſtitution. It is impoſſible, therefore, that any of the preceding ſubſtitutes could have it in their power to diſpone away the eſtate gratuitouſly, to the prejudice of their right. Had the heirs whatſoever of a ſtranger been ſubſtituted, they could not have been diſappointed in this manner: and it cannot alter the caſe, that they are the heirs of Lord *Kennedy*.

Lord *Caſſilis* was certainly a limited fiar. Both his father Lord *Kennedy*, and he, had made up their titles upon the entail; and therefore he could not execute a deed ſo contrary to the right upon which he poſſeſſed. If he had had a ſon, Lord *Caſſilis* was certainly bound by the entail; and as there were always hopes, till the day of his death, that he might have had an heir-male, he never could be an unlimited fiar.

Pleaded for Sir *Thomas Kennedy*, Heirs of tailzie are always conſidered as unlimited proprietors, unleſs ſo far as they are expreſsly tied up in the entail. Though it ſhould appear that the entailer clearly meant to impoſe a limitation; yet if he has not done it in proper words, it will not be effectual. This has been decided in the caſes of *Hepburn* of *Keith*, *Sinclair* of *Carlowrie*, *Leſlie* of *Findraſſie*, and many others. And, *à fortiori*, when there appears no intention in the entailer to limit his heirs, a limitation will not be preſumed, if the words can admit of another conſtruction. Deeds executed by heirs of tailzie, in contravention of prohibitive, irritant, and reſolutive clauſes, are not *ipſo jure* void; but are only reducible at the inſtance of ſubſtitutes, to whom that privilege was given by the entailer. Theſe deeds are good againſt every other perſon.

Lord *March* has no title to bring ſuch challenge. He is not called by any of the ſubſtitutions, nor by any nomination executed by the Earl of *Caſſilis* or Lord *Kennedy*. He is not called as any of the heirs, who

who are either to have a benefit, or to be bound by the entail, or to anſwer the views and purpoſes of it, by carrying on the repreſentation of the family, or bearing the name and arms. His only claim is as one of two heirs-portioners of line to Lord *Kennedy*.

It is admitted, that when the eſtate devolves to heirs whatſoever, the fetters fly off. The reaſon is, becauſe the ſucceeding heirs do not ſtand in ſuch a character as to qualify themſelves creditors under the limitations. They are neither bound nor capable to carry on the repreſentation intended, to preſerve which the limitations only were deviſed. The family was to be repreſented by one heir of tailzie only; but when the ſucceſſion opens to heirs whatſoever, it muſt of courſe divide among heirs-portioners. The very ſame reaſon demonſtrates, that the laſt ſubſtitute ought to be under no obligation to the firſt heir whatſoever, or to the firſt ſet of heirs-portioners, who ſucceed in the preſent caſe, upon the failure of the whole ſubſtitutes particularly called by the entail.

The deſign of the maker of every entail, is to continue a repreſentation of his family in a connected ſeries of heirs; and therefore every ſubſtitute is under an obligation to thoſe more remote. But when the whole ſeries of heirs called by the entailer is exhauſted, when the eſtate is about to devolve on a ſet of heirs-portioners, no wiſe man could mean to debar the laſt ſubſtitute from continuing the repreſentation, and thereby ſaving the eſtate from being parcelled out.

Prohibitive clauſes are only intended to ſecure the eſtate to the heirs of tailzie; but heirs-portioners, who come in by the laſt termination, do by no means fall under that deſcription. The whole heirs of tailzie are bound, under an irritancy, to bear the defunct's name and arms: The heirs-portioners muſt acknowledge, that they are under no ſuch obligation; and conſequently they are not heirs of entail in the ſenſe of the ſettlement.

This doctrine is ſtrongly ſupported by the act 1685, which provides that thoſe who think proper, may entail their eſtates with clauſes irritant and reſolutive, to prevent the ſubſtitutes from doing any deeds whereby the lands may be appriſed, adjudged, or evicted from the other heirs ſubſtituted in the entail; that is, from the other branches or members of the entail, whom the proprietor was allowed, by the former part of the clauſe, to ſubſtitute, under ſuch proviſions and conditions as he thought proper. This is further confirmed by the following clauſe, which enacts, "That upon contravention, "the next heir of tailzie may purſue a declarator, and ſerve himſelf "heir to him who died laſt infeft, and did not contravene, without a-"ny neceſſity of repreſenting the contravener." This privilege is here given to the next heir of tailzie, who is to repreſent the entailer, and to paſs by the contravening heir. Were Lord *March*'s plea well founded, if the Earl's ſettlement had been made public in his own lifetime, it would have been competent to the remoteſt heir whatſoever to have forfeited him of his eſtate. The abſurdity of this is evident.

This doctrine is further ſupported by the opinion of Sir *George Mackenzie*, in his treatiſe *Of tailzies;* and of Lord *Stair*, *b.* 4. *tit.* 18. §8.

It was farther obſerved, That it is very much againſt the inclination of every entailer, that his eſtate ſhould divide among heirs-portioners. It is impoſſible, therefore, that he can mean any favour to them. Lord *Caſſilis*'s view was to perpetuate the repreſentation of his family, and to prevent his eſtate from being divided: he reſerved power to himſelf and

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to his ſon to nominate ſuch heirs as they thought proper, after the ſubſtitutes contained in the deed. It was not therefore his intention to give his eſtate to the heirs whatſoever; but it is evident, that they were brought in as mere words of ſtyle, and to exclude the fiſk.

It was further ſaid, That the heirs whatſoever are in no ſenſe heirs of entail: That it is impoſſible that one ſhould be an heir of entail *activè*, and not *paſſivè*; and therefore it is incongruous, that the heirs whatſoever ſhould inſiſt to have the privileges of heirs of tailzie, and yet refuſe to be ſubject to the fetters of the entail. Had Lord *Caſſilis* intended, that the heirs whatſoever ſhould ſucceed, he would have provided, that the eldeſt ſhould take the eſtate without diviſion. The ſubſtitution under which Lord *March* claims, is to heirs and aſſignees. This is by no means a branch of ſucceſſion, but merely words of ſtyle. It was formerly the practice, that the entailer ſubſtituted his own heirs whatſoever; but now the heirs of the laſt incumbent are commonly called. But this makes no ſort of difference.

" The Lords found, That the deceaſed *John* Earl of *Caſſilis* could " lawfully execute the ſettlement under reduction in favour of Sir " *Thomas Kennedy*; and therefore repelled the reaſons of reduction, " and aſſoilzied the defender therefrom, and decerned; and ſtop- " ped all further procedure in the ſervice at the inſtance of the " Earl of *March*."

For Lord *March*, *Alex. Murray. Montgomery*, *Ro. Dundas*, and *Miller*. For Sir *Thomas Kennedy*, *D. Kennedy*, *Wa. Steuart*, *Lockhart*, and *Ferguſon*. Clerk, *Home*.

19th *May* 1760. This judgment was affirmed upon an appeal.

Both parties having claimed the titles of *Earl* of *Caſſilis* and *Lord Kennedy*, and preſented petitions to his Majeſty, the queſtion was remitted to the houſe of Lords; who found, That Sir *Thomas Kennedy*'s right to the honours was preferable. P. M.

N° CCXVIII. 6th *March* 1760.

Sir MICHAEL STEWART of *Blackhall*, and WILLIAM CUNINGHAM of *Craigends*,

AGAINST

Captain JOHN POLLOCK.

Freeholder infeft in the juſt and equal half, pro indiviſo, *of lands rated* in cumulo *in the ceſs-books at* L. 1000 Scots *of valued rent, is not intitled to a vote.*

AT the *Michaelmas* meeting of freeholders of the county of *Renfrew*, in *October* 1759, Captain *John Pollock* claimed to be inrolled upon the following title, *viz.* a charter under the great ſeal in his favour, of the juſt and equal half, *pro indiviſo*, of all and haill the twenty-pound land of *Over Pollock*, proceeding on the procuratory of reſignation contained

tained in a diſpoſition by his brother Sir *Robert Pollock* to him, of the aforeſaid juſt and equal half of the ſaid lands; upon the precept in which charter he was duly infeft.

And for inſtructing, that theſe lands were rated in the ceſs-books at *L.* 400 *Scots* of valued rent, and upwards, reference was ade to the valuation-book of the county, then lying on the table; from which it appeared, that the whole twenty-pound land of *Over Pollock* was valued and paid ceſs at the rate of *L.* 1000 *Scots*.

This title was *objected* to by Sir *Michael Stewart*, one of the freeholders; but it was carried by a majority to inrol the claimant: upon which Sir *Michael Stewart*, and Mr *Cuningham* of *Craigends*, complained to the court of ſeſſion.

Objected by the complainers, That the inrolment was improper and illegal in a double reſpect: 1*ſt*, The defender's title is founded upon an undivided property; 2*dly*, The valuation is alſo undivided.

The right of freehold, and the privileges thereto annexed, ſuppoſe a certain eſtate, either of property or ſuperiority, in which the claimant ſtands infeft, diſtinct from the eſtate of every other perſon, and of which he muſt alſo be in poſſeſſion. None of theſe requiſites can apply to the caſe of an undivided property, whether it be by inheritance or purchaſe. In ſuch caſe, *concurſu faciunt partes*, and neither of the joint proprietors can ſay, that any particular eſtate belongs to him either in property or ſuperiority. For this reaſon it was, that the ſtatute 1681 enacted, that appriſers or adjudgers ſhould have no vote during the legal; and that after the legal expired, the appriſer or adjudger firſt infeft ſhould only have a vote, and no other appriſer or adjudger, *until their ſhares were divided.* If the half, *pro indiviſo*, of *L.* 800 of valued rent could intitle to a vote, by the ſame rule a vote might be created by diſponing the one half, *pro indiviſo*, of a four-pound land of old extent, retoured before the 1681; but it is an eſtabliſhed point, that ſuch retours cannot be divided; and that though the retour contained a twenty-pound land, it would intitle only to one vote.

In the conteſted election for the county of *Dumbarton*, between the Honourable *John Campbell* of *Mamore* and Mr *Haldane* of *Gleneagles*, in 1724, Mr *Campbell* having petitioned the Houſe of Commons againſt the election of Mr *Haldane*, and the affair being remitted to the committee of privileges and elections, that committee came to the following reſolutions, which were approved of by the houſe, *nemine contradicente*, " That it is the opinion of this committee, that any convey-
" ance of undivided ſhares of the ſuperiority of any lands in the ſhire
" of *Dumbarton*, in order to multiply votes, or ſplit an intereſt in ſuch
" ſuperiority amongſt ſeveral perſons, with a view to enable them to vote,
" is contrary to the act of parliament made in *Scotland* in the 1681, in-
" titled, *Act concerning the election of commiſſioners for ſhires.*—Reſolved,
" That it is the opinion of this committee, that no perſon claiming a
" right by a purchaſe to an undivided part of the ſuperiority of any
" lands, where the extent of the lands of which he claims the ſupe-
" riority is not particularly ſpecified, and the lands diſtinguiſhed by
" the charter by which he claims a vote, has any right to vote in the
" election of a commiſſioner to ſerve in parliament for the ſhire of
" *Dumbarton.*"

This authority is in point. And upon the ſame principle, the *cu-*

mulo valuation of the lands in queſtion afford a ſeparate objection to this claim. The reſpondent's proper eſtate has no valuation. He has no eſtate that can be valued, while the property remains, *pro indiviſo*, with him and his brother. It is the eſtate itſelf, and not the perſon, that is to be rated, and pay ceſs according to ſuch valuation.

Anſwered for Captain *Pollock*, The reſpondent is infeft and in poſſeſſion of a *certain* eſtate, belonging to himſelf only, and to no other perſon whatever, *viz.* the juſt and equal half of the twenty-pound land of *Over Pollock*; and although that half remains undivided from the other half belonging to Sir *Robert*, yet in reaſon, and in the eye of law, it is an eſtate in him certain in itſelf, and diſtinct from the eſtate of his brother. He is admitted vaſſal of the Prince in the juſt and equal half of the lands. He is liable, by the *Reddendo* of his charter, in the half of the duties payable to the Prince for the whole tenement, which half is aſcertained and ſpecified in the clauſe of *Reddendo*. In every reſpect he is vaſſal to the Prince in one half of the lands, as much as Sir *Robert* is in the other. The act of parliament 1681 ſays, that he who is infeft in property or ſuperiority, and in poſſeſſion, of lands paying ceſs at the rate of *L.* 400 of valued rent, ſhall have a vote; but makes no diſtinction, whether the property is divided or undivided. The reſpondent, therefore, ſubſumes, in the expreſs terms of that ſtatute, that he is publicly infeft, and in poſſeſſion, of lands liable in public burdens to his Majeſty for *L.* 500 of valued rent; and conſequently he is intitled to vote as a freeholder.

Many freehold eſtates in *Scotland*, by old extent as well as by valuation, conſiſt, in part, of lands poſſeſſed in rundale, or in common property, *pro indiviſo*. Now, although theſe lands, poſſeſſed in rundale, and in common property, did certainly enter into the computation both of the old extent and of the valued rent, yet this was never conſidered as a good objection againſt the proprietor claiming to be admitted to the privileges of a freeholder: and if a part of the eſtate may conſiſt of common property, there occurs no good reaſon why the whole may not be undivided; *nam majus aut minus non variant ſpeciem*. The caſe of adjudgers makes no way againſt the reſpondent's argument: for, antecedent to the act 1661, introducing the *pari paſſu* preference of appriſers, the firſt appriſing completed by charter and ſeiſin, veſted the ſole right of the lands in that appriſer, ſubject to redemption within the legal. The act 1661, from equitable conſiderations, brought in all appriſings equally, that were within year and day of the firſt effectual one; but notwithſtanding this departure from the common rules of law in favour of creditors, the firſt appriſer or adjudger who obtains himſelf infeft, does ſtill, as to all other effects, diveſt the debtor, and after the expiry of the legal, is held to be the proper vaſſal in the lands. Neither does the argument which is uſed, with regard to dividing the old extent, apply; for it is expreſsly declared by the ſtatute 1681, "That no diviſion of the old extent made after that time by re-
" tour, or any manner of way, ſhall be ſuſtained as ſufficient evidence
" of the old extent:" but there is no ſuch enactment with regard to the valued rent.

The objection, That the valuation of this eſtate is undivided, is equally ill founded: for it is not diſputed, that the valuation of the whole lands is *L.* 1000 *Scots*; and therefore the valuation of the half muſt neceſſarily

ceſſarily be *L.* 500. A decree of the commiſſioners of ſupply could not make it more certain, that *L.* 500 is the half of *L.* 1000, than it is by the nature of the thing.

Replied, The caſe of eſtates conſiſting partly of a common property in muirs and moſſes, is very different from the preſent. Such commonties are conſidered as acceſſory to the property to which they belong, and are regulated thereby, and the perſon claiming being in poſſeſſion of a diſtinct and certain eſtate, is intitled to vote upon that eſtate, although perhaps a commonty, which, as being *acceſſorium, ſequitur ſuum principale*, ſhould be computed in the valuation.

"The Lords ſuſtained the objections to Captain *Pollock*'s vote, and "granted warrant for expunging him from the roll." I. C.

Act. *Wa. Steuart* and *Lockhart*. Alt. *Garden* and *Miller*. Clerk, *Tait*.

N° CCXIX. 6th *March* 1760.

Sir MICHAEL STEWART,

AGAINST

The BOROUGH of PAISLEY.

Body-corporate cannot ſtand on the roll of freeholders.

THE town of *Paiſley* was firſt erected in 1488, into a borough of barony, in favour of the abbot of *Paiſley*, and was by him diſponed to the bailies and town-council, to be holden of the abbot. Afterwards, in 1658, *William* Lord *Cochran*, the lord of erection of the abbey of *Paiſley*, reſigned the ſuperiority of this borough, in favour of the magiſtrates, town-council, and community, to be holden of the crown; upon which a charter under the great ſeal and infeftment were expeded.

The lands belonging to the borough, and which were thus made to hold of the crown, were rated in the ceſs-books at *L.* 1078 : 6 : 8 *Scots*, of valued rent; and, among other public burdens, they were in uſe anciently to pay their ſhare of the charges appointed by act 35. parl. 1661, to be furniſhed to the commiſſioners elected to ſerve in parliament for the ſhire.

In virtue of this freehold, the borough of *Paiſley* ſtood on the roll of freeholders of the county of *Renfrew* for a long tract of years, and was in the regular uſe of ſending a delegate to the meetings of freeholders, who was always admitted as a conſtituent member, and voted in all queſtions at election or *Michaelmas* meetings.

In the year 1743, a complaint was lodged againſt the town of *Paiſley*, in terms of the act of the 16th of his late Majeſty, for having that borough ſtruck off the roll: but this complaint was diſmiſſed upon an informality, without entering into the merits of the queſtion.—At the general election in 1754, the magiſtrates of *Paiſley* made choice of *William Caldwall* for their delegate; who was preſent, and voted at ſaid election. At *Michaelmas* 1759, a new delegate, *viz.* Bailie *Robert Fulton*, was

was received, and voted as a conſtituent member of the meeting.—But Sir *Michael Stewart*, one of the freeholders, complained to the court of ſeſſion within four months after that meeting, in terms of the above ſtatute, and inſiſted, that the delegate of the borough of *Paiſley* had no right to ſtand upon the roll of freeholders.

Argued by the complainer, The privilege claimed by this borough is of a moſt uncommon nature, enjoyed by no other borough in *Scotland*, and directly oppoſite to the whole ſpirit and intendment of the election-laws. The magiſtrates and council are but the repreſentatives of the borough. The town's property does not veſt in them, but in the community or body-politic; and the delegate by them choſen is a ſubordinate repreſentative of the borough.—It is certain, that no other freeholder can be admitted to act by proxy or delegation; and it does not occur how this ſhould be competent to a corporation. The delegate is clearly excluded by the ſtatute 1681, which enacts, "That none ſhall vote "in the election of commiſſioners for ſhires, but thoſe who ſhall be "*publicly infeft*, in property or ſuperiority, and *in poſſeſſion*, of a forty-"ſhilling land," *&c.* Every requiſite of the ſtatute is wanting to this pretended elector.—Neither can he take the oath of poſſeſſion, which muſt be ſwore in the identical words preſcribed by the act of the 7th of the King, *viz.* "That the lands and eſtate of for which I "claim a right to vote, *&c.* is actually in my poſſeſſion, and do really "and truly *belong to me*, and is my own proper eſtate, and is not con-"veyed to me in truſt, or for or in behalf of any other perſon whatſo-"ever," *&c.*

Further, it is a general rule, That no perſon is intitled to a voice in the election of a commiſſioner to parliament, but who is equally intitled to be elected; and, as a body-coporate is incapable of the one, it cannot be intitled to the other.

In ſhort, every paragraph of the ſtatutes regarding elections ſeem to diſcharge this anomalous right. Theſe ſtatutes ſpeak all along of *freeholders*, or of *perſons*, which are uſed as ſynonymous terms, and ſeem plainly to exclude bodies politic or incorporate, which never were intended to be, and no where are inveſted with this privilege: nay, the ſtatutes go ſtill farther, and expreſsly declare, that bodies politic or incorporate are *diſabled* to vote in elections. By the act 16th of the King, it is declared, "That where lands are holden of the King or "Prince, by a peer, or other perſon, or body politic or incorporate, "who by law are diſabled to be a member of the houſe of Commons, "or to vote in ſuch elections, in ſuch caſes the proprietor, and not the "ſuperior, ſhall be intitled to vote." It is true, this clauſe is inſerted in that part of the ſtatute which reſpects the county of *Sutherland*: But it is plain, that the words are general, and declaratory of the common law, and are added as a general deſcription of peers and bodies politic, that by law are diſabled to be members of the houſe of Commons, or to vote in ſuch elections.

Anſwered, The magiſtrates and town-council of *Paiſley* are infeft and in poſſeſſion of an unqueſtionable freehold eſtate in this county, greatly above the valuation required by law, and they have been in the conſtant uſe and poſſeſſion of voting by a delegate in all meetings of freeholders, and at all election-meetings, for near 100 years paſt. By act 35. parl. 1661, it is provided, "That beſides all heritors who hold "a forty-ſhilling land of the King *in capite*, that alſo all heritors, life-"renters,

" renters, and wadſetters, holding of the King, and others who held " their lands formerly of the biſhops or abbots, and hold of the King, " and whoſe yearly rent doth amount to ten chalders of victual, or " *L.* 1000, all feu-duties being deduced, ſhall be, and are capable to " vote in the election of commiſſioners of parliament." Soon after the date of this ſtatute, the borough of *Paiſley* came to hold their lands of the King, in place of the abbot, and lord of erection; and as their yearly rent exceeded *L.* 1000, ſo, according to the underſtanding of the law at that time, they were admitted by a delegate among the freeholders of the county, and have continued to enjoy that privilege ever ſince. The act 21. parl. 1681, extends the privilege of voting a little further, by requiring only *L.* 400 of valued rent to qualify a freeholder; but there is nothing contained in this, or any poſterior act, which prohibits the borough of *Paiſley* from voting by their delegate.

The reſpondents believe, they are not the only incorporation poſſeſſed of a freehold eſtate, which, by the practice of *Scotland*, has been admitted to vote amongſt the other vaſſals of the crown, at the meetings of freeholders.——One inſtance of this kind appears to have been conteſted, and decided in the parliament of *Scotland* on the 6th of *Auguſt* 1681, in the caſe of the double election of the lairds of *Keir* and *Airth* as commiſſioners for the ſhire of *Stirling*; where the parliament found, That the maſter of Trinity hoſpital in *Stirling*, who was infeft in lands mortified to the hoſpital, of the valuation required by law, had a good title to vote.——The deciſion ſtands on record, in the following words. " Reſolved, That a maſter of an hoſpital, having lands mortified " thereto, holden of the King, being forty-ſhilling land, or ten chal- " der of victual, being kirk-lands holden of the King, wherein the " maſter is infeft, may have a vote in the election of commiſſioners to " parliament."——And to come ſtill nearer to the preſent caſe, it appears from the records of the *Scots* parliament, that the title of this very borough to vote by their delegate in the election of a commiſſioner to parliament, was formerly called in queſtion in the year 1703, on occaſion of a controverted election for the ſhire of *Renfrew*; but their vote was ſuſtained by a reſolution of parliament upon the 14th *May* ſaid year. —— The minute of parliament, in ſo far as it regards that queſtion, is in the following words. " *Item*, The objection againſt the " town of *Paiſley*, (That being a borough of barony, howbeit infeft, " and in poſſeſſion of a freehold, yet, ſince no burgeſs could be a dele- " gate for that end, therefore the incorporation could have no vote in " the election of barons), was conſidered, and the houſe having ac- " quieſced to ſuſtain the vote, the objection was paſſed from by the " party, and allowed to be withdrawn." —— The reſpondents are intitled to found on this as a *res judicata* in favour of the borough.

The complainer has not condeſcended upon any law, ſtatute, or deciſion, which expreſsly condemns or excludes the right of voting in ſuch caſes by a delegate. The original plan of our conſtitution ſeems to have been, that all the vaſſals of the crown, whether ſole perſons or bodies politic and corporate, ſhould give ſuit and preſence in parliament. The examples were perhaps but rare of bodies-corporate, other than royal boroughs holding lands of the crown; but if any ſuch exiſted before the act of *James* I. which diſpenſed with the attendance of the ſmaller vaſſals, they certainly would be obliged, as vaſſals of the crown, to give ſuit in parliament

ment by their delegates: And therefore it does not occur, that the right of this borough to vote by their delegates, is either anomalous or unconſtitutional. It is true, the language of the election-ſtatutes is adapted to the common caſe of freeholders, intitled to vote in their own proper right; and that there is no proviſo with regard to the freehold eſtates belonging to bodies corporate, which perhaps were not very common in ancient times: But the reſpondents cannot perceive, that there is any qualification required by any ſtatutes, which does not belong to this borough or to the delegate who votes in its right. And more particularly with regard to the truſt-oath, the delegate can ſafely ſwear, "That the eſtate under which he claims to vote, does truly "belong to and is poſſeſſed by the borough whoſe delegate he is, for the "borough's own uſe, and not in truſt for any other."—It is indeed impoſſible, that he can take it in the preciſe words preſcribed by the ſtatute; but if the right of the borough is not impeached by any of the preceding ſtatutes, ſurely this oath required to be taken by the other freeholders, and which, from its conception, does not preciſely apply to bodies-corporate, can never be deemed to imply a forfeiture of their right.

Beſides, whatever doubts might ariſe upon the abſtract queſtion, in caſe the reſpondents were now *in petitorio*, they apprehend, that the above judgment of the parliament of *Scotland*, in the year 1703, and their long poſſeſſion as well before as ſince that deciſion, muſt ſecure them in the enjoyment of that right, until it is taken from them by an act of the legiſlature.

Laſtly, Suppoſing the objection to have been originally good, it is not now competent; becauſe by the act of the 16th of the late King, it is provided, "That it ſhall be lawful for any freeholder "ſtanding upon the roll, to object to the title of any perſon then ſtanding on the roll, and for that purpoſe to apply to the court of ſeſſion "by complaint, at any time *before the 1ſt day of December* 1743; and "if no ſuch complaint ſhall be exhibited within the time foreſaid, "then, and in that caſe, no freeholder who at preſent ſtands upon "the rolls laſt made up, ſhall be ſtruck off, or left out of the roll, except upon ſufficient objections ariſing from the alteration of their "rights," *&c.*——And therefore, as the borough of *Paiſley* ſtood upon the roll at the date of the above ſtatute, and no complaint was properly made in this court within the limited time, ſuch complaint is not now competent, except upon an alteration of the right or title upon which the borough was originally inrolled. It is true, that at the laſt meeting, a new delegate was ſent; but the accidental change of the perſon of their delegate, was no alteration of the right or title upon which the borough ſtood on the roll; nor was Bailie *Fulton* of new admitted and entered as a freeholder; the roll was made up as it formerly ſtood, the delegate for *Paiſley*, without the adjection of any name, ſtanding the 5th in that roll, and Bailie *Fulton* only produced his commiſſion, and was marked in the minutes as the delegate for *Paiſley*.

Replied, Whatever might be the conſtitution of the *Scots* parliament before the union, it is clear, from the whole ſtrain of the election-laws ſince that period, that no borough or body-corporate can have a right of voting as a freeholder in any county. As to the caſe of the Trinity hoſpital of *Stirling* in 1681, had the election-laws ſtood as they now do, requiring both property and poſſeſſion in the claimant, it is believed, that

that no regard could have been had to ſuch a qualification. Beſides, the claimant himſelf was there infeft; whereas here the community pretends to a privilege of acting by a delegate or proxy. And further, this claim of the Trinity hoſpital has been long dropped, and its name does not now appear in any roll.—— The other deciſion of parliament, *anno* 1703, in the caſe of this borough of *Paiſley*, is far from being concluſive; for the words of the minute ſhow, that notwithſtanding the objection was paſſed from by the party, yet the parliament had difficulties upon it, though, at the laſt, they *allowed* the objection to be withdrawn, and *acquieſced* to ſuſtain the vote.—— Beſides, though that deciſion were in point, yet it would fall now inevitably to be altered, in conſequence of the act 7th of his late Majeſty, requiring *property* and *poſſeſſion*, and an oath to be taken to that purpoſe by the claimant.—— Neither can the reſpondents find any protection from the act 16th of the late King, which ordains, that no freeholder then on the roll ſhall be ſtruck off, unleſs complained of before the 1ſt *December* 1743.—— The evident purpoſe of that ſtatute was not to fix unalterably the qualification of voters, but to free the *perſons* admitted on the roll from challenge, during their own lives, where no complaint was exhibited within the time appointed. Once in a life the qualification itſelf does certainly become liable to challenge. Upon this plan the whole of the ſtatute proceeds; every ſentence of it relates evidently to an inrolment of perſons, and not of rights or titles. The legiſlature had no idea of ſo abſurd a thing, as bodies-corporate ſtanding on the roll of freeholders of any county, and ſo made no proviſion with regard to them. The directions of the ſtatute, therefore, cannot apply to them; the remedy is left to the common law, by which every freeholder has a proper right and intereſt, to have every voter not properly qualified, removed from among them. Beſides, ſuppoſing the ſtatute did apply, there ſeems to be much the ſame alteration, when one delegate is choſen from a borough in place of another, as when a predeceſſor dies, and the heir craves to be inrolled in his place.

" The Lords ſuſtained the objections to the vote of the town of " *Paiſley*, and found, That the delegate of that borough had no " right to ſtand upon the roll of freeholders of the ſhire of *Ren-* " *frew*; and ordained him to be expunged therefrom." I. C.

Act. *Wa. Stewart*, *John Craigie*, and *Lockhart*. Alt. *Miller*. Clerk, *Tait*.

N° CCXX.

N° CCXX. 13th *June* 1760.

JOHN WATSON of *Muirhouſe*, and other CREDITORS of ANDREW SCOT,

AGAINST

The YOUNGER CHILDREN of the deceaſed ROBERT SCOT merchant in *Glaſgow*.

1. *Proviſion in a marriage-contract to* heirs and bairns. 2. *Reduction on the act* 1621.

BY contract of marriage, in 1705, between *Robert Scot* and *Agnes Stark*, he provided her in a liferent-annuity of 500 merks, to be uplifted out of certain tenements. This annuity was to be reſtricted to 300 merks, in caſe of *bairns* exiſting at his death; or if they ſhould all happen to die before majority or marriage, her full proviſion was to take place.——He alſo became bound "to provide, in favour of the *heirs* "*whatſoever* to be procreate of the marriage, the ſum of *L.* 8000 *Scots*; "and in implement thereof *pro tanto*, he provided to the ſaid heirs the "foreſaid tenements of land; and he alſo provided to the *heirs whatſo-* "*ever* to be procreated of the ſaid marriage, the fee of the haill conqueſt; "and bound and obliged himſelf, and his foreſaids, that he ſhould do "no fact or deed to hurt or prejudge his ſaid future ſpouſe, or the "*bairns* to be procreate of the ſaid future marriage, of their reſpec- "tive proviſions of liferent and *fee* above written."

Robert Scot died in 1725, and left a ſon, *Andrew*, and five younger children, then infants.

Andrew Scot made up titles to his father's heritage, and was infeft as heir to him, without objection made by the younger children.

In 1740, when (as it afterwards appeared) *Andrew Scot*'s debts exceeded his effects, but no diligence had been done againſt him, he granted a bond of proviſion to his brother *Robert*, and four ſiſters, for 3400 merks, of which his brother was to have 1000, and each of his four ſiſters 600 merks.

The bond bore this recital: "Foraſmuchas my ſaid father died a "conſiderable time ago, without making any ſettlement of his affairs, "or proviſions in favour of his other children, and they being ſtill "unprovided for by me, and reaſon and equity requiring, that a ſuit- "able proviſion were made to them out of their ſaid father's ſubjects, "to which I have ſucceeded as eldeſt lawful ſon and heir to him; "therefore, and for the love, favour, and affection I bear to them," *&c.*

Upon this bond infeftment was taken about two months after its date.

In a ranking of *Andrew Scot*'s creditors, this bond was *objected* to upon the act 1621, as having been a gratuitous deed, granted to conjunct perſons, after he had contracted debts beyond the value of his effects, in prejudice of his lawful and onerous creditors.——It was *an-*

ſwered,

ſwered, That the bond was onerous and effectual, as having been granted in ſecurity or ſatisfaction of the younger childrens ſhare of the proviſions in their father's marriage-contract, and when no diligence had been done againſt the granter.

Pleaded for the creditors, 1*mo*, The children had no right to any ſhare of the proviſions in the marriage-contract 1705.—— The ſum of *L.* 8000 was thereby *heritably* ſecured on certain tenements, and provided to the *heirs whatſoever of the marriage*; which is a technical term, admitting of no ambiguity in a ſettlement of ſucceſſion to lands, but importing, that the eldeſt ſon is called firſt, in excluſion of all the younger children. —— 2*do*, The bond in queſtion was not granted in implement of the proviſions in that contract, had any been thereby made for the younger children.——Its narrative makes no mention of the contract; but, on the contrary, bears, that they were unprovided by their father, and that the granter had ſucceeded as heir to him; and that therefore he granted it for *love and favour*, which is the ſtrongeſt deſcription of a gratuitous deed. —— And, 3*tio*, Suppoſing the bond had been given in implement of thoſe proviſions, and that the ſame had been due; yet, as it proceeded from the voluntary act of the debtor, in order to give his brother and ſiſters a preference to his other lawful creditors, when they were not demanding it, and when he knew his inſolvency, it muſt be conſidered as an act of fraud, which the law cannot ſupport.

Anſwered for the younger children, 1*mo*, Where ſums of money, whether heritable or moveable, or burgal tenements, are provided in the marriage-contracts of mercantile people, to heirs of the marriage, the whole children or *bairns* are thereby underſtood to be called as *heirs of proviſion*, though the heir of line would be intitled to ſucceed in ſuch a ſettlement of a land-eſtate, where the repreſentation of a family may be ſuppoſed in view; *February* 1727, *Macdoual*, *Stewart*'s anſwers, *voce*, *Heirs of proviſion*. But here the parties to the contract have further explained their intention of calling the whole children, by the reſtriction of the wife's annuity in caſe of *bairns* exiſting, and the father's obligation to warrant to *the bairns their proviſion of fee*; and when *heirs and bairns* are called in ſuch a contract, the clauſe is underſtood to be *exegetic*, and to call the whole bairns; 13th *February* 1677, *Carnegie*; 17th *February* 1736, *Ranken*.

2*do*, The narrative of the bond ſets forth nothing but what was true; only it does not tell the whole truth, or that by the contract the younger children were intitled to about 10,000 merks, inſtead of 3400 ſecured to them by this bond. Suppoſing the granter to have overlooked the contract deſignedly, it can afford no objection to the validity of the bond, when it ſtill appears, that he was debtor to them in a much larger ſum by that contract, which he muſt be preſumed to have had in view when he granted this ſecurity.

And, 3*tio*, Notwithſtanding the act 1621, it is competent to an onerous creditor, at any time, to take payment of a debt juſtly due to him, or to take a conveyance of any ſubject in ſecurity of it, although the debtor be then inſolvent, if he has not been interpelled by prior diligence; 31ſt *January* 1627, *Scougal*. Nor can this be conſidered as a ſecurity voluntarily given by the debtor, as he was in law and juſtice bound to have given it, the ſubjects on which the bond is granted be-

ing the ſame with thoſe provided in the contract, of which the children could have compelled their brother to denude in their favour, as far as their ſhares extended; ſo that he truly held the ſame only in truſt.

" The Lords repelled the objections to the bond, and found the " younger children intitled to be ranked on their intereſt produ- " ced in their due courſe, conform to the date of their infeftment."

D. R.

For the creditors, *Lockhart*. Alt. *Ferguſon*. Clerk, *Kirkpatrick*.

N° CCXXI. 20th *June* 1760.

JAMES EARL of MORTON,

AGAINST

DAVID COVINGTREE of *Newark*.

The ſea-weed of which kelp *is made, belongs to the heritor whoſe lands lie next to the ſhore, in virtue of his grant thereof, with* wreck and ware.

THE Earl of *Morton* ſtands infeft, upon a charter from the crown, in the earldom of *Orkney*, and lordſhip of *Zetland*, with the lands, privileges, and pertinents, *&c.* thereto belonging, *as well by ſea as by land, with wreck and ware.*

In *Orkney*, the lands are frequently diſtinguiſhed by the denomination of *penny-lands*; and eighteen of theſe penny-lands are underſtood to compoſe what is called an *uriſland*.

The Earl of *Morton*, in virtue of the above charter, is proprietor of fifteen penny-lands in the uriſlands of *Watland* and *Skealon*, in the pariſh of *Deerneſs*.

Mr *Covingtree* of *Newark* is proprietor of the lands of *Newark* and *Air*, extending to nine penny-lands, lying nominally within the ſaid two uriſlands, under a charter from the crown of theſe and other lands, " cum omnibus moſſis, moris, mareſiis, *wreck*, *wair*, *waith*, " *&c.* ac omnibus pertinentibus quibuſcunque, tam non nominatis " quam nominatis, tam ſubtus terra quam ſupra terram, procul et " prope, ad prædictas terras pertinen."

The greater part of theſe lands belonging to *Newark* lie in a continued ſtretch along the ſea-ſhore, and the Earl's lands, within or behind them; only a ſmall part thereof extending to the ſhore, at the end of *Newark*'s grounds; and in ſome places, at a diſtance from the ſea, part of their grounds are intermixed.

The tenants of both had been immemorially in uſe of carrying off the ſea-ware caſt in on the ſhore, for the manure of their lands.

This they uſed to divide in ſome proportion to their reſpective penny-lands; and the Earl's tenants of his inland grounds were ſuffered, by *Newark*'s tenants, to come through his grounds, and carry off their ſhares of that wreck.

Of

Of late the manufacture of kelp was introduced into that country. The weed proper for making it, is not the looſe ware thrown in by the ſea, but what is there called *tang*, which grows upon and adheres to the rocks, and is cut off from them at low water. —— *Newark*'s tenants begun to carry on that manufacture ſucceſsfully, upon the ſhore of his own lands; and thereupon the Earl's tenants attempted to do the ſame on thoſe ſhores, but were interrupted.

The Earl thereupon brought an action before the ſheriff againſt *Newark*, for ſupporting his tenants in the poſſeſſion of making kelp on thoſe ſhores; and the ſheriff decerned in the Earl's favour.

Newark obtained a ſuſpenſion, and repeated a declarator of his own excluſive right to the property of thoſe ſhores to which his lands are adjacent, and to the cutting of *tang*, and making kelp thereupon.

Pleaded for the Earl, It is agreed, that wreck and ware, and every thing which is the natural growth of the ſea, is *inter regalia*. —— Here the parties have equally grants from the crown of *wreck and ware*; but as theſe are general, they are only proper titles of preſcription of an excluſive right, by poſſeſſion on any particular part of the coaſts.——The lands of the parties lie runrig or rundale, and their poſſeſſion of the ſea-ware has been joint, conform to their reſpective ſhares or penny-lands of the two uriſlands, which ſeem to have been originally entire tenements, though now divided into penny-lands. —— Their right and intereſt in the ſhores and ware, *&c.* muſt therefore be common or joint, according to their poſſeſſion, in the ſame manner as if one original grant had been made by the crown to the ſeveral proprietors of thoſe uriſlands of the wreck and ware on the coaſt thereof, conform to their ſeveral proportions of the uriſland. *Newark*'s having the property of moſt of the land next the ſhore, makes no difference, as diſcontiguity does not exclude the Earl's intereſt, under the grant and poſſeſſion of what is *inter regalia*. —— So it has been found in the caſe of ſalmon-fiſhings; and in the ſame manner, in the caſe of moſſes and muirs, which are not *inter regalia*, a joint property may be conſtituted on them by poſſeſſion ſolely as part and pertinent of other lands to which they are not contiguous.

Anſwered for *Newark*, 1*mo*, That his titles from the crown are more ancient than the Earl's; as he refers to a charter upon record to one of his predeceſſors, as far back as the 1632; whereas the Earl has only produced a charter in 1743. If, therefore, *Newark*'s titles are broad enough to give an excluſive right, they muſt be ſuſtained as preferable. 2*do*, With us the ſea-ſhores, though ſtill common for the uſes of navigation, are underſtood to be *inter regalia*, and the property thereof may be given by the crown to a ſubject. —— A gift of lands, with *wreck and ware*, however, neither has been, nor can to any purpoſe be granted, excepting where theſe lands are in ſome part bounded by the ſea and its ſhores; and then ſuch a grant does imply an excluſive right to the ſhores adjacent to the lands, with the whole produce thereof, ſubject only to the uſes of navigation, without the neceſſity of preſcription to ſupport it;—*Craig*, *lib.* 1. *d.* 16. § 42.;—*Skene*, title, *Wreck and ware*.—The Earl's charter contains ſome lands bounded by the ſea, and ſo far he may have right to the ſhores; but as *Newark*, on the other hand, has a grant from the crown, not only of his lands lying next to the ſea,

ſea, but of the *wreck and ware* on the ſhores thereof, he has thereby an excluſive title to the ſaid ſhores adjacent to his lands.—Though part of the parties lands are interjected together, yet the bulk of them are neither runrig nor rundale, and *Newark* has a great tract of ground next the ſhores in queſtion. —— There is no evidence, nor even tradition, of each uriſland having been once a diſtinct tenement: That name, and the leſſer proportions of penny-lands, are merely deſcriptive appellations, ſuch as, in other parts, *forty-ſhilling lands, &c.* 3*tio*, The caſe of ſalmon-fiſhings is different: for though *inter regalia*, and frequently granted with lands, yet ſuch a fiſhing is conſidered as a diſtinct tenement; ſo that a right thereto may, and does often ſubſiſt, without any concomitant grant of lands: whereas there is no inſtance of wreck and ware being granted ſeparate from lands that are contiguous to the ſhore. —— Moſſes and muirs not being *inter regalia*, can afford no rule for this caſe; though, if the circumſtances are ſuppoſed parallel, the deciſion will be agreeable to *Newark*'s plea. For example, if a moſs lies within one heritor's lands, and another at a diſtance has been in uſe only to get peats or turf from it, the property would be held to belong to the contiguous heritor, and the other to have only a ſervitude. —— And, 4*to*, The poſſeſſion of the Earl's tenants, of getting ſea-ware for the uſe of their lands, may have eſtabliſhed a proper predial ſervitude for continuing them in that poſſeſſion, but can give them no right to extend that ſervitude, or incroach on *Newark*'s property in the ſhores, and *tang* growing thereon, which they have never poſſeſſed, and which is proved to be a weed quite diſtinct from the *ware* commonly uſed for manure; though in ſome other places of *Orkney*, where they have no *ware* thrown in by the ſea, they may have applied *tang* in that way, before the manufacture of kelp was known.

"The Lords found, That the Earl of *Morton*, as heritor of a part of "the uriſlands of *Watland* and *Skealon*, has no right to cut ware "or tang for making of kelp upon the rocks or ſhores of *New*-"*ark* and *Air*; and decerned and declared accordingly; and aſſoil-"zied *Newark* from the proceſs at the Earl of *Morton*'s inſtance; "reſerving to the Earl, and his tenants, the ſervitude of carrying "off from the ſhore of the two uriſlands of *Watland* and *Skealon*, "or *Air*, what wreck and ware ſhall be caſt thereupon, in pro-"portion to his penny-lands in the two uriſlands, conform to uſe "and wont." D. R.

Act. *J. Monro, F. Garden.* Alt. *D. Rae, Lockhart.* Clerk, *Gibſon.*

N° CCXXII.

N° CCXXII. 25th *June* 1760.

JAMES and MARGARET FARMERS,

AGAINST

AGNES MYLES and AGNES ANNAN.

Objection ſuſtained to a teſtament ſigned by notaries, That the witneſſes did not hear the defunct give orders for ſigning, nor ſaw her touch the pen.

Agnes Farmer, the ſiſter of *James* and *Margaret Farmers*, executed a teſtament in favour of *Agnes Myles* and *Agnes Annan*, who were her grandnieces. This teſtament was ſigned by two notaries for the defunct, and was executed recently before her death.

It was *objected* againſt this teſtament by the heirs *ab inteſtato*, That the inſtrumentary witneſſes did not *hear* the defunct give warrant to the notaries to ſign, nor did they *ſee* her touch the pen: That the ſubjects conveyed by the teſtament amounted to ſo conſiderable a ſum, as to make this a deed of *importance*, and to ſubject it to the regulations of the act 1579, which, as to ſuch deeds, requires two notaries and four witneſſes to atteſt the execution: That the execution of this teſtament was inconſiſtent with the expreſs words of the act 5. 1681, by which it is declared, "That no witneſs ſhall ſubſcribe as witneſs to any party's "ſubſcription, unleſs he then know that party, and *ſaw* him ſubſcribe, "or *ſaw* or *heard* him give warrant to a notary or notaries to ſubſcribe "for him, and, in evidence thereof, touch the notary's pen, or that "the party did at the time acknowledge his ſubſcription; otherwiſe "the ſaid witneſſes ſhall be reputed, and puniſhed, as acceſſory to for-"gery."

It was proved, That one of the notaries read over the diſpoſition, and then turned about to the bed-ſide where *Agnes Farmer* was lying, and was heard by the witneſſes either to ſay to her, I know you cannot write; or to aſk her, If ſhe could write? But one of the inſtrumentary witneſſes depoſed, "That he did not *hear* her make any anſwer, or de"clare to them, that ſhe could not write; nor did he *hear* any orders "given to the notary to ſubſcribe for her; nor did he *ſee* her touch "the pen; nor did he hear her ſpeak a ſingle word that day; and ſhe "might have been aſleep or awake for him: That he ſaw the two no-"taries ſign the diſpoſition, which he believed they were ſigning in "her name; but whether by her order, he knows not; and he "thought there was nothing incumbent on him but to put his name "to the paper. Depones, He did not ſee a pen in the hand of either "of the notaries when they went to the bed-ſide; nor did he ſee either "of them have a pen, till they were ſigning at the table."

Another inſtrumentary witneſs deponed, "That he *heard* no anſwer "given, nor did he obſerve a pen in the notary's hand: That he did "not *hear* the defunct declare to the notaries, that ſhe could not write, "or give them any orders to ſubſcribe for her, or touch the pen."

A third inſtrumentary witneſs deponed, " That he did not *hear* her " make any anſwer, or declare ſhe could not write, or give him any " orders to ſign for her; and that he imagined there was no more in- " cumbent on him, than to put his name to the paper."

Anſwered, The deed in this caſe was extremely rational; and it is proved, that the defunct expreſſed her intention of ſettling her affairs in this manner ſome time before her death. The deed was read over in her preſence; and ſhe is proved to have had at that time, though weak, her memory and judgment entire. The two notaries have depoſed, " That after reading over the deed to her with an audible voice, " they aſked her, the one after the other, alſo with an audible voice, " ſo as the witneſſes might hear, If the deed was wrote according to her " mind? and, If ſhe was pleaſed with it? To which ſhe anſwered, Yes, " yes: That they then aſked her, If ſhe could write her name? To " which ſhe anſwered, No: That they then ſaid to her audibly, ſo as " the witneſſes might hear, You give us then commiſſion, before theſe " witneſſes, to ſign for you? and having a pen, reached it over to her; " when ſhe put her hand forth from under the cloaths, and took hold " of it."——And the fourth inſtrumentary witneſs deponed, " That he " heard the queſtion put to her by the notary, If he ſhould ſign for " her? and ſaw her take the pen from the one notary, and deliver it to " the other; though, being at a diſtance from the bed, he did not hear " her anſwer."

Another witneſs alſo, who had been ſent for to be an inſtrumentary witneſs, but did not arrive till after the deed had been read, and one of the notaries had obtained his authority, deponed expreſsly, to his having heard the other notary aſk authority to ſign for her, and that ſhe anſwered, Yea, yea, or, Yes, yes. And even the three inſtrumentary witneſſes referred to by the purſuer have depoſed, That they heard the diſpoſition read over, and heard the notaries aſk the defunct, Whether or not ſhe could write? It is impoſſible, therefore, to doubt, that her anſwer to this queſtion was agreeable to what the notaries have depoſed. And it is further proved, That the defunct, ſome days after the teſtament was executed, delivered it to the father of *Agnes Myles*, and recommended it to him to take care of it.

In point of law, the evidence of the inſtrumentary witneſſes, improbatory of the deed, may certainly be redargued by contrary evidence. For if, upon any occaſion, the inſtrumentary witneſſes ſhould upon oath deny their having ſeen the party ſubſcribe a deed, or heard him acknowledge his ſubſcription, the verity of the deed might ſtill be aſtructed by collateral proofs; as was found in a late caſe, *Iſabel Rolland contra John Rolland* malſter in *Culroſs*; though that caſe never came to a final deciſion.

Obſerved on the bench, That in this caſe *non deficit jus ſed probatio.*—In the caſe of notaries, the greateſt ſtrictneſs ought to be obſerved, and they ought not to be allowed to diſpenſe with any part of the ſtrict forms.

" The Lords found, That the teſtament was not regularly executed; " and therefore reduced the ſame; and decerned." 1. c.

Act. *Johnſtone, Ferguſon.* Alt *Lockhart.*

N° CCXXIII.

N° CCXXIII. 26th *June* 1760.

COLIN, DUNCAN, and MARGARET CAMPBELLS,

AGAINST

JOHN CAMPBELL of *Ardnave*.

Husband's power over the goods in communion.

KAtharine Campbell was firſt married to *John Campbell* of *Killinallan*, by whom ſhe had ſeveral children; and after his death, to *John Campbell* of *Ardnave*; of which marriage there was no iſſue.

Ardnave, the ſecond huſband, got ſome money, and other effects, with his wife, which had been left her by her firſt huſband; and, on the other hand, he ſettled her in a liferent-annuity, and other proviſions, in caſe of her ſurviving.

This marriage having diſſolved in *September* 1748, by the predeceaſe of the wife, *Colin*, *Duncan*, and *Margaret Campbells*, her children of the firſt marriage, brought an action, as executors *qua* neareſt of kin to their mother, againſt *Ardnave*, for the half of the goods in communion. Their right to inſiſt in it was not diſputed; and the defender having been ordained to exhibit an account of theſe goods, which he did by way of charge and diſcharge, the purſuers made an objection to this account, founded on the following ſtate of facts.

In the year 1741, during the ſubſiſtence of this marriage, one *Alexander Campbell*, a relation of the defender's, had died, and left the defender his executor and univerſal legatar, with the burden of paying his debts and ſome legacies. Theſe debts and legacies amounted to about *L.* 1000 *Sterling*; for all, or moſt of which, the defender gave his own bills to the creditors and legatees. The effects and debts owing to the defunct amounted to above *L.* 1200 *Sterling*; and as moſt of theſe debts were owing by bills or open accounts, the defender converted the whole into bonds, bearing intereſt, and ſecluding executors. All this was done from the 1741 to the 1745.

The defender was likewiſe himſelf creditor to ſeveral perſons by bills and ſmall accounts, particularly to *James Campbell* of *Ballinaby*, in *L.* 73, 11 *s.* 9 *d.*; for which ſum he took a bond, ſecluding executors, dated 5th *September* 1748, and payable in five days thereafter, his wife being then on deathbed.——About the ſame time, alſo, he diſpoſed of a number of cattle then on his farm, to *Gillies* of *Duchra*; from whom he got a bond, dated 20th *September*, and payable five days thereafter.

The defender, in making up his account of the goods in communion, took credit for the bills which he had granted to *Alexander Campbell*'s creditors and legatees, as ſo many moveable debts owing by him; but refuſed to charge himſelf with the bonds which he had taken from *Alexander Campbell*'s debtors, or the two laſt bonds above mentioned, taken in *September* 1748; as the whole of theſe were bonds bearing intereſt, and conſequently heritable *quoad* the intereſt of huſband and wife.

Objected

Objected by the purſuers, In the *firſt* place, The defender cannot be allowed to exhauſt the goods in communion, by the bills which he granted to *Alexander Campbell*'s creditors and legatees. Theſe bills ought to be paid out of *Alexander Campbell*'s executry, which is more than ſufficient for that purpoſe. At leaſt, 2*dly*, If the bills are brought *in computo*, to reſtrict the wife's ſhare, the bonds, which came in place of the executry-funds, ought likewiſe to be brought *in computo* to enlarge it. For it would be unjuſt to load the wife with her ſhare of *Alexander Campbell*'s debts, while the huſband pockets all his effects. This was probably what the defender had in view when he changed the ſecurity, by taking bonds, bearing intereſt, from *Alexander Campbell*'s debtors, in place of the former bills and open accounts, while, at the ſame time, he gave bills for the debts and legacies owing by him. But the law will give no countenance to a device of this kind, calculated plainly to fruſtrate or diminiſh the wife and childrens right to their ſhare of the goods in communion. The huſband's power of adminiſtration of theſe goods, is indeed very ample during the marriage; but where he does any deed manifeſtly fraudulent, and having no other tendency but to diſappoint the legitim or *jus relictæ*, the court of ſeſſion is in uſe to give relief; *Stair*, 10th *January* 1679, *Grant contra Grant*; *February* 1728, *Henderſon*.——And, 3*dly*, For the ſame reaſon, it ſeems clear, that the two laſt bonds taken from *Campbell* of *Ballinaby* and *Gillies* of *Duchra*, in *September* 1748, and made payable five days after date, with an evident and moſt unfair intention of abridging the wife's intereſt in the moveables, when ſhe was lying *in extremis*, ought to be brought *in computo* of the goods in communion.

Anſwered for the defender, The creditors and legatees of *Alexander Campbell* were ſatisfied with his bills, in place of taking immediate payment of their money. This happened as far back as the year 1744; and the defender did not then dream of any ſuch claim as the purſuers are now inſiſting in. Suppoſing no bills had been granted, the legacies and debts of *Alexander Campbell*, being ſimply moveable, would ſtill have affected the goods in communion. And with regard to the bonds which the defender got from the ſeveral debtors, it was ſurely a moſt proper act of adminiſtration, to convert debts ſimply moveable into bonds bearing intereſt. At the ſame time, the defender is not bound to account for the reaſons of his conduct in this reſpect. A huſband has the ſole and unaccountable management of the effects in communion during the marriage; and though he cannot diſappoint the wife or children by any ſettlement to take effect at death, which is all that is proved by the deciſions quoted for the purſuer, there is no doubt, that every alienation by him of theſe goods, or act of management concerning them, while the marriage ſubſiſts, is good againſt every perſon whatever.

" The Lords found the defender liable to account for the two laſt " bonds; and repelled the objection as to the reſt." 1. c.

Act. *Rob. Campbell*, and *Lockhart*. Alt. *Ferguſon*.

N° CCXXIV.

N° CCXXIV. 27th *June* 1760.

ROBERT IRVINE in *Luſſe*, and THOMAS FORSYTH in *Ecclefechan*,

AGAINST

JANET KNOX of *Kirkconnel*, and GEORGE ARNOT her huſband.

The ſon of an heireſs poſſeſſing in a ſtate of apparency falls under the act 1695, *notwithſtanding his father's having right to the liferent by* courteſy.

Sarah Irvine ſtood infeft as proprietor of the lands of *Kirkconnel*. She was married to *William Knox*, and had children by him. Upon her death, in 1740, her eldeſt ſon, Dr *William Knox*, ſucceeded to the eſtate; but never made up his titles. He ſurvived his mother for ſeveral years, and died while his father was yet alive. The ſucceſſion then opened to *Janet*, the Doctor's ſiſter.

Dr *Knox*, after his mother's death, intromitted with part of the rents of the eſtate; for which he granted receipts. He alſo granted five tacks under the character of *heritable proprietor of the lands*. Some of thoſe tacks were of a long endurance; and particularly he granted one to *Robert Irvine* and *Thomas Forſyth*, and their heirs, of a houſe and yard in the village of *Ecclefechan*, and five acres of the commonty of *Hoddam*, (then under diviſion), for 1260 years. The tack acknowledged the receipt of a graſſum of *L.* 20 *Sterling*; and bore alſo an obligation for payment of a tack-duty of 5 *s. Sterling* yearly.

The tenants entered to poſſeſſion upon thoſe tacks; but the diviſion of the commonty of *Hoddam* not being completed till after Dr *Knox*'s death, *Irvine* and *Forſyth* brought a proceſs againſt *Janet Knox*, his ſiſter, the next heir to the eſtate, for having her decerned to implement that part of the tack reſpecting the five acres of that commonty.

Janet Knox pleaded in defence, That Dr *Knox*, the granter of the tack, had made up no title as heir to his mother in the lands; and therefore that it was not binding upon her: and *ſeparatim* objected to the extraordinary length of its endurance; but did not much inſiſt on this point. Upon theſe grounds ſhe alſo repeated a reduction of the tack.

The purſuers *anſwered*, That the Doctor had poſſeſſed the lands, as apparent heir to his mother, for much more than three years, as appeared from the tacks, and diſcharges of rent, granted by him; and therefore the defender, the next heir paſſing by, was liable for his onerous debts and deeds, in purſuance of the act 1695; and that the onerosity of this tack would be ſufficiently inſtructed.

The defender *replied*, 1*mo*, Dr *Knox* had no total poſſeſſion of the eſtate; neither did he poſſeſs any particular part of it as apparent heir; but only granted ſome partial receipts for rents, not amounting all together to a full year's rent. This he did by tolerance from his father,

who had a preferable and excluſive right to poſſeſs the eſtate by the *courteſy*, as having been huſband to the heireſs, and had children by her. 2*do*, The tacks were granted without his father's permiſſion; and as he was deſigned in them *younger of Kirkconnel*, the tackſmen muſt have known his father's preferable right; which muſt likewiſe be preſumed, as the *courteſy* is a public, and not a private, title of poſſeſſion. 3*tio*, The act 1695 being a correctory law, cannot be extended beyond its preciſe words and ſanction. The poſſeſſion intended, and ſpoken of, in the ſtatute, is only the poſſeſſion of an apparent heir intitled to poſſeſs under that character. The poſſeſſion of a ſon whoſe father has a liferent, by which he the father has a preferable title to poſſeſs, is not ſuch as is intended by the ſtatute, as it can only be conſtructed to have flowed from the father's tolerance; and muſt be conſidered as properly his poſſeſſion, ſince, without his conſent, the ſon could not have acceſs to poſſeſs. This conſtruction of the ſtatute is ſupported by the deciſion 24th *July* 1752, *Pitcairn contra Lundine*.

Pleaded for the purſuers, 1*mo*, The father never was in poſſeſſion of more than the half of the mains, being but a ſmall part of the eſtate; and Dr *Knox* appears to have poſſeſſed the whole lands ſet in tenantry, from his mother's death, in 1740, till his own death, in 1748, though the whole receipts granted by him have not been recovered. He had no other title than his apparency; nor does any mandate or commiſſion from his father to him appear, or evidence that it was in virtue of a tolerance from him that the Doctor poſſeſſed. 2*do*, The title he aſſumed of *heritable proprietor*, though not ſtrictly proper, becauſe he was not infeft, yet being the title under which apparent heirs commonly act, proves, that he aſcribed his poſſeſſion to that title. Though the *courteſy* is a part of the common law; yet the actual title which a huſband may thereby have is *facti*, and can only appear by his poſſeſſion, ſeeing the extent of it depends on the wife's infeftment: it is often reſtricted by the marriage-articles, and creditors are not obliged to know theſe particulars. Here creditors and tenants who contracted with Dr *Knox*, could not aſcribe his poſſeſſion to a title derived from his father, of which they had no knowledge, eſpecially when they ſaw the apparent heir for ſo many years aſcribing his poſſeſſion to his own heritable title only. And, 3*tio*, The act 1695 is correctory; but this caſe falls under both the intent and words of it. The fair conſtruction of the ſtatute is, that where an apparent heir poſſeſſes his predeceſſor's eſtate for more than three years, his onerous debts and deeds are effectual againſt the ſucceeding heir, unleſs it is proved, that the apparent heir did not poſſeſs under his heritable title, but under a ſingular title derived from ſome other perſon, preferable to and excluſive of his apparency, and to which ſeparate title he openly aſcribed his poſſeſſion. ——There is no difference between the *courteſy* and any other right competent to exclude the apparency; and a third party having ſuch right, but lying by, can never be ſaid to exclude the apparent heir from poſſeſſing properly as ſuch, merely becauſe if that third party had uſed his right, the heir would not have had acceſs to poſſeſs. Neither can an apparent heir's acquiring any ſingular title, keep him from falling under the act 1695, when that title is latent; far leſs when he expreſsly aſcribes his poſſeſſion to his heritable title. ——The

caſe

caſe of *Pitcairn* does not apply: for there *Lundine*, who contracted the debt, not only poſſeſſed under a ſingular title, but truly was not *in poteſtate* to poſſeſs as apparent heir to his mother, becauſe no ſuch title was known to belong to him at the time.

The court gave different interlocutors in this caſe; which ſeemed to be attended with difficulty. —— *It was obſerved on the bench*, That here the apparent heir did in fact poſſeſs; and that third parties were *in bona fide* to contract with him, as ſuppoſing him to poſſeſs under that character.

" The Lords repelled the defence on the courteſy; and found, That " *William Knox* poſſeſſed three years as apparent heir; and alſo " found, That the tack, notwithſtanding of its endurance, is " good againſt *Janet Knox*, the heir paſſing by." D. R.

Act. *Miller, Advocatus.* Alt. *Montgomery, Hew Dalrymple.* Clerk, *Kirkpatrick.*

N° CCXXV. 27th *June* 1760.

ROBERT HOG merchant in *Campvere*,

AGAINST

SMART TENNENT merchant in *Campvere.*

The juriſdiction of the court of ſeſſion over natives of Scotland *reſiding at* Campvere, ratione originis, *not excluded by that of the Conſervator.*

ROBERT *Hog*, a member of the *Scots* factory at *Campvere*, and who had for many years reſided there, brought an action againſt *Smart Tennent*, another member of that factory, concluding, 1*mo*, For payment of the balance of an account-current between them; 2*do*, For the contents of a bill drawn by a merchant in *Leith* upon *Tennent*, payable to *Hog*; and, 3*tio*, For damages, in reſpect of *Tennent*'s having injured *Hog* in his trade, by defaming his character, and having inſulted and beat him.

The defender *objected* to the juriſdiction of the court of ſeſſion to try this cauſe, at leaſt in the firſt inſtance, in reſpect of both parties being reſidenters at *Campvere*, and ſubject to the juriſdiction of the conſervator-court there; which he alledged was privative of the juriſdiction of the court of ſeſſion.

Pleaded for the defender, By the 81ſt act of K. *James* IV. parl. 6. the conſervator's juriſdiction was eſtabliſhed over the *Scots* merchants at the ſtaple port; and the act appears to have been made ſoon after the ſtaple contract was entered into between the Royal Boroughs and the magiſtrates of *Campvere*; which ſhows, that it muſt have been ſpecially intended for the benefit of the members of the new-eſtabliſhed factory at that port, in order to prevent them from being put to the trouble and expence of coming over to *Scotland* to get juſtice. —— The conſervator's juriſdiction is confirmed and enlarged by many ſubſequent ſtatutes;

ſtatutes; and the meaning of the words in the original act, "That no "merchant ſhall purſue another before any other judge beyond the "ſea, but the conſervator," appears to have been, that "no merchants "beyond the ſea ſhould reſort to any other judge at home," as the act expreſsly gives the conſervator a juriſdiction over ſuch merchants, in queſtions with each other; and without that conſtruction, it could not give the benefit to thoſe merchants which was evidently intended.—— 2*do*, Sir *James Balfour*, Sir *George Mackenzie*, Sir *James Stewart*, and our other lawyers, put this conſtruction upon the conſtitution of the conſervator-court, that its juriſdiction was ſole and excluſive over the merchants ſubject to it; nor could the *Scots* legiſlature have in view merely the excluding that of the foreign judges, over whom it had no power.—— 3*tio*, By the 4th article of the ſtaple contract, the juriſdiction of the *Dutch* judges is expreſsly excluded, and that of the conſervator further confirmed, by providing, "That every queſtion or "difference, civil or criminal, happening between two of the *Scots* "nation, ſhall be *only* pleaded, adjudged, and, by definitive ſentence, "determined by the court of the conſervator," *&c.*—— 4*to*, The long and continued acquieſcence of the merchants reſiding at this port, in the conſervator's juriſdiction, tends greatly to ſtrengthen it; as no example can be given of any proceſs having before been brought by them, againſt any of their own number, in this court, in the firſt inſtance.—— And, 5*to*, In 1749 the conſervator having given judgment in a proceſs between *Coutts and Company* and *Ramſay*, a bill of advocation thereof was refuſed as incompetent; and the Lord Ordinary's interlocutor adhered to on a reclaiming petition.—— In that caſe it ſeemed to be admitted on all hands, that no queſtion ariſing betwixt the merchants at *Campvere* could, in the firſt inſtance, be brought before any other court than the conſervator's; and if the contrary ſhould be now found, his juriſdiction will be in effect entirely aboliſhed.

Anſwered for the purſuer,— Juriſdiction, at firſt view, ſeems to be naturally territorial, or confined to perſons and things locally within a territory ſubject to the dominion of the ſtate by which the juriſdiction is delegated.—— This notion, however, but ill agrees with the nature and exigencies of government.—— It has therefore been juſtly conſidered, that laws ought to have more reſpect to perſons, as members of ſociety, than as inhabitants of a particular ſpot of ground. Every man born under a ſtate or government becomes a member of the body-politic, and is intitled to privileges as ſuch. It is reaſonable, on the other hand, he ſhould ſubject himſelf to the laws of that ſociety in which he is firſt received. Now, as he cannot be deprived of his native privileges, without a regular forfeiture, neither can he throw off his natural ſubjection, without a ſpecial immunity. On this principle our lawyers have agreed, that a ſubſiſting *forum competens* is eſtabliſhed *ratione originis*. Neither our laws nor our ſupreme judicatures are conſidered as ſtrictly territorial, but extend to natives where-ever they go; and change of reſidence cannot afford an exemption from them. Hence acts of attainder, and outlawries, are paſſed againſt ſubjects abroad *animo remanendi*; and daily proceedings are had in this court againſt ſuch, upon citations at the market croſs of *Edinburgh*, pier and ſhore of *Leith*.—— Decrees in thoſe caſes may require

quire the aid of foreign judges in their execution, while neither the debtors nor their effects are here; but where the perſon ſued appears in court, (as in this caſe), he muſt ſhow a legal exemption, otherwiſe the proceſs muſt go on againſt him.——Now, the defender has inſtructed no exemption in this caſe. For, *1mo*, The words of King *James* IV.'s act demonſtrate, that no more was thereby intended than to prohibit the *Scots* merchants abroad from ſuing each other before foreign judges, when they could have their diſputes determined by the conſervator, or the courts of their native country.——"Before "any other judge beyond the ſea," can never be underſtood to exclude the judges at home, or on this ſide of the ſea. And although the *Scots* legiſlature had no power over foreign judges, yet it had power over *Scots* ſubjects, and could impoſe penalties on them if they neglected its injunctions. And with this view, by the 96th act, 6th parl. *James* VI. erecting the *Scots* factory in the *Netherlands* into an incorporation, the members thereof were obliged to take an oath of obedience to the King and his laws. —— The conſervator-court being entirely a *Scots* court, its juriſdiction can at moſt be only conſidered as cumulative with that of the ſupreme courts in this country, whence it derived its origin; and the defender's argument, if it proves any thing, proves too much; as it would oblige the *Scots* merchants, in all other parts of the world, to bring their actions before the conſervator at *Campvere*. *2do*, *Balfour*, and our other lawyers, carry the matter no farther than is univerſally admitted, namely, that the conſervator is a judge competent in queſtions between merchants within his bounds; but none of them ſay, that his juriſdiction is excluſive of the court of ſeſſion. *3tio*, The ſtaple contract makes for the purſuer, not againſt him; the ſole view thereof being to exclude the *Dutch* judges, and *Dutch* laws, from affecting the factory-concerns. —— The parties to that contract had no power, had they been inclined, to have carried the matter further; though, according to the defender's doctrine, the power of the conſervator would be abſolute and uncontrollable: which could never be *expedient*, even for the factory at *Campvere*; as it is an evident advantage for them to have their cauſes tried in the ſupreme court here, or in the laſt reſort, if they incline, rather than to lie at the mercy of a particular officer, who may poſſibly be not deeply ſkilled in law. *4to*, Many caſes may have occurred, parallel to the preſent, which may have eſcaped notice, by the juriſdiction not being declined; and, at any rate, the public rights and privileges of a ſubject cannot be loſt *non utendo*. And, *5to*, As to the deciſion in the caſe of *Coutts* and *Ramſay*, it ſeems to have been given without mature conſideration; and it does not apply to this caſe, as there the parties had ſiſted themſelves before the conſervator, and received his judgment. So that the queſtion was, Whether this court could review his decree? whereas here the cauſe is brought originally before this court.

The court conſidered this caſe chiefly on the ground of the *forum ratione originis*; which was held to be ſufficient to eſtabliſh a juriſdiction in this court over natives abroad. And it was obſerved, that it was ſo found in the competition of Captain *Wilſon*'s creditors.

The erection of the conſervator-court at *Campvere* was not thought to give any exemption from the ſupreme court of this country; but rather on the contrary; that the eſtabliſhment of a *Scots* factory there

ſtrengthened the original juriſdiction of this court over the *Scotſmen* compoſing that factory; and the propriety of the deciſion in the caſe of *Coutts*, as to the conſervator's judgments not being ſubject to review here, was much doubted of.

" The Lords repelled the declinature to the juriſdiction of this court; " and ſuſtained the action." D. R.

For the purſuer, *Dav. Rae.* Alt. *Sir Jo. Stuart.* Reporter, *Auchinleck.* Clerk, *Home.*

N° CCXXVI. 8th *July* 1760.

CLARK,

AGAINST

GORDON,

In boroughs, one may build as near the march as he pleaſes, providing no drop falls upon his neighbour.

Clark and *Gordon* had contiguous houſes in the town of *Kirkcudbright*, with back yards extending behind each of them. *Gordon* had an old kitchen behind his houſe, built cloſe upon the march betwixt the two yards. *Clark*, in the year 1755, built on his ſide a coal-houſe, the ſide-walls of which almoſt touched the wall of *Gordon*'s kitchen. At the ſame time he alſo built an houſe of office, opening towards his own yard, the back-wall of which came within about eighteen inches of *Gordon*'s kitchen. *Gordon* thereafter pulled down his kitchen, and built it up a-new, in a better form, with more windows towards *Clark*'s yard; and he thereupon brought a proceſs before the magiſtrates of *Kirkcudbright*, inſiſting, That *Clark* ſhould be decerned to remove both his coal-houſe and houſe of office, as being built too near the wall of his kitchen. The magiſtrates ordained both theſe houſes to be pulled down; and *Clark* ſuſpended.

Pleaded for *Gordon*, 1*mo*, With regard to the coal-houſe, That there muſt always be ſome ſpace betwixt contiguous houſes, which is regulated by the cuſtoms of particular boroughs: That in *Kirkcudbright* it is fixed at eighteen inches: That the coal-houſe in queſtion touches the wall of the kitchen.

Anſwered for *Clark*, That Mr *Gordon* never interrupted him when building his coal-houſe; and therefore that it is too late to inſiſt upon having it pulled down. Beſides, as the coal-houſe is built with a ſhade-roof, ſloping towards *Clark*'s own yard, no drop can fall from it; nor can it be in the ſmalleſt degree prejudicial to Mr *Gordon*'s property.

2*do*, With regard to the houſe of office, it was *pleaded* for *Gordon*, That though every man may uſe his property in what manner he pleaſes, yet he muſt not do it *in æmulationem vicini*: That there were many other more convenient places in *Clark*'s yard, where ſuch a houſe might be built: That it was offenſive, and a very great nuiſance to Mr *Gordon*.

Anſwered, That every man may build upon his own ground what houſes

houſes he thinks proper, though they ſhould be hurtful to his neighbour, unleſs he has a ſervitude.

" In regard *Clark* was not interrupted when building his houſes, as " the coal-houſe was built in ſuch a form as that the eaſing-drop " could not prejudge the charger's property, and as an houſe of " office is not declared to be a nuiſance by the laws of *Britain*, " the Lords ſuſpended the letters *ſimpliciter*." P. M.

Act. *Swinton.* Alt. *Arch. Murray.* Clerk, *Home.*

N° CCXXVII. 9th *July* 1760.

MACDONALD Collector of Exciſe,

AGAINST

MACNEIL of *Tayniſh.*

Bond to the King effectual, though not bearing the words Domino Regi. *— Unintelligible bond explained by extraneous evidence.*

NEil Macneil of *Tayniſh*, grandfather to the defender, on the 21ſt *May* 1714, granted an obligation of the following tenor: " Binds " and obliges him, his heirs, *&c.* to content and pay to *William Renton* " collector of the exciſe of *Argyleſhire*, and his ſucceſſors in office, the " ſum of *L.* 12 *Sterling*, for the exciſe of the haill brewers within the " lands therein mentioned, for the ſpace of one year complete, com- " mencing from the 1ſt of *November* inſtant to the 1ſt of *November* " 1714 years, being *L.* 3 *Sterling* quarterly, beginning the firſt quar- " ter's payment thereof at and againſt the 1ſt day of *February* next to " come, and ſo forth quarterly," *&c.* *Macdonald*, the preſent collector, brought a proceſs againſt *Tayniſh*, for payment of *L.* 5, 10*s.* as the balance of two quarters reſting by his grandfather, and for intereſt.

Pleaded for *Tayniſh* the defender, No action can be ſuſtained upon this bond, 1*mo*, Becauſe, by ſtatute 39th of the 33d year of *Henry* VIII. all obligations taken to the King are to be made in theſe words, *Domino Regi, et ſolvend. eidem Domino Regi:* whereas the bond in queſtion, which is for exciſe-duties, is taken to another perſon, and does not ſo much as bear to be for the uſe of his Majeſty: 2*do*, Becauſe the bond is abſolutely unintelligible, and cannot be the foundation of any judgment.

Anſwered for the purſuer, The defence upon the *Engliſh* ſtatute was over-ruled by the Lord Ordinary in *Auguſt* 1754, and his judgment is now final. But beſides, the defence is not good. The ſtatute enacts, That all obligations ſhall be taken in theſe words; but it does by no means annul thoſe that are taken in different terms. The only penalty is, that perſons who take ſuch obligations in other words may be impriſoned; but the obligation is ſtill effectual. Agreeable to this it was decided 27th *November* 1735, Commiſſioners of Exciſe againſt *Mitchell* of *Pitteadie*. Though the bond is inaccurately wrote, yet it may be underſtood; and is explained from the exciſe-books, which demonſtrate, that

that the year agreed upon was, from the 1ſt of *November* 1714 to the 1ſt of *November* 1715.

"The Lords found *Tayniſh* liable only for the *L.* 5, 10 *s.* of principal, "but not for intereſt." P. M.

Act. *Advocatus.* Alt. *Ro. Campbell.* Clerk, *Juſtice.*

N° CCXXVIII. 9th *July* 1760.

Sir WILLIAM MAXWELL,

AGAINST

JOHN PRINGLE.

A minor gets two rings worth about L. 40, *and grants bond for* 150 *guineas, payable at the firſt term after his marriage or death, and renews the bond after majority;—the bond found good.*

SIR *William Maxwell*, when not quite major, purchaſed from Mr *Charles Murray* two rings; for which he granted an obligation of the following tenor. He ſets forth, That Mr *Murray* had inſtantly ſold and delivered to him two rings, *in value upwards of L.* 40 *Sterling*; for which he binds himſelf, and his heirs, to pay to him 150 guineas at the firſt term after his marriage or death, with penalty and annualrent after that term: And he farther binds himſelf to renew the bond after his majority, when required.

Sir *William* being major, grants a new bond to Mr *Murray*, by which he acknowledges, that he is juſtly addebted, reſting, and owing, to him, *L.* 157, 10 *s.* which he obliges himſelf to pay at the terms and on the conditions mentioned in the firſt bond.

Sir *William* inſiſted in a reduction of the bond, againſt Mr *Pringle*, truſtee for Mr *Murray*'s creditors.

Pleaded for the purſuer, This bond proceeds on a falſe narrative, as it ſets forth, that Sir *William* owed Mr *Murray* 150 guineas, whereas only *L.* 40 was advanced. The bond is uſurious, as the ſum it contains is double what could ever be due, according to any calculation of the purſuer's death or marriage. The court has ſo decided in two late caſes ſimilar to the preſent, but much more favourable to the creditors; Dr *Abercrombie contra* Earl of *Peterborough*, 12th *July* 1745; Sir *Michael Stewart contra* Earl of *Dundonald*, 7th *February* 1753. In both theſe caſes, the contracts were truly bargains of hazard, in which the creditors run a great chance of loſing their money. In the preſent caſe, there was no hazard; the bond was undoubtedly due, and only payment delayed till death or marriage; and the conſideration to be paid by the debtor for that forbearance greatly exceeded the higheſt computation of legal intereſt that could poſſibly be due at any of theſe periods.

Anſwered for the defender, This was not a loan of a certain ſum of money, for a conſideration above the legal intereſt. It was a chance-bargain. The parties agreed, that the rings were worth above *L.* 40; but how much, is uncertain. Mr *Murray* had a *pretium affectionis* for his

his rings. Sir *William*'s death or marriage were uncertain as to the time, and he might have died bankrupt. Such chance-bargains are not *contra bonos mores*, nor reprobated by the law of *Scotland*. The preſent caſe differs from that of the Earl of *Peterborough*, in three material articles: 1*mo*, This is not a loan of money, but a bargain about rings, the value of which was not fixed. 2*do*, In the preſent caſe, Sir *William*, three years after, when major, *ſciens et prudens*, and when he muſt have known the juſt value of the rings, renewed the bond; which is paſſing from all objections. 3*tio*, Sir *William* has diſpoſed of the rings, and ſo cannot reinſtate Mr *Murray* in his former condition, which is neceſſary in all ſuch caſes.

Replied for the purſuer, It was not a chance-bargain; for the value of the rings was fixed to *L.* 40, and is not yet pretended to be greater. The new bond is admitted to have come in place of the old one; ſo is liable to the ſame objections. The rings were clearly ſold for *L.* 40; and this action is not brought to reduce the ſale of the rings *in totum*, but only to correct the inequality.

"The Lords repelled the reaſons of reduction, and aſſoilzied." P. M.

Act. *Miller*. Alt. *Lockhart*. Clerk, *Kirkpatrick*.

N° CCXXIX. 9th *July* 1760.

WATSON,

AGAINST

WATSONS.

Seats in churches, taken to heirs and neareſt repreſentatives, divide among the neareſt relations in the ſame degree.

THE magiſtrates of *Dundee*, in the year 1669, impowered their kirk-treaſurer to ſell, at certain rates, the pews or deſks which they had erected in the eaſt kirk of *Dundee*. In purſuance of this commiſſion, they were ſold to different perſons; and the diſpoſitions run uniformly in the following words: "To ſuch a perſon, and his heirs, and "others his neareſt repreſentatives whatſoever, reſiding within the "town and pariſh, heritably; ſecluding his aſſignees."

Three of theſe ſeats came by progreſs into the perſon of *Alexander Watſon*; who died in 1756, without children, leaving *Eliſabeth Watſon*, the purſuer, his ſiſter-german, and *Agnes* and *Euphame*, ſiſters-conſanguinean. Upon his death, *Eliſabeth*, the purſuer, *contended*, That ſhe, as her brother's ſole heir, was intitled to all the three ſeats. Her ſiſters *maintained*, That each of them had an equal right; and as there were three ſeats, each of them was intitled to the poſſeſſion of one.

Pleaded for *Eliſabeth* the purſuer, Seats in churches, as being *res religioſæ*, cannot be ſold, nor be capable of property, as feudal rights. All that can be competent to any particular perſon, is the right of ſitting in a certain ſeat. Though ſeats in churches, however, are not feudal rights, as they are held of no ſuperior, and incapable of infeft-

ment; yet, ſeeing they are ſervitudes, or rights affecting an immoveable ſubject, they are heritable rights, and ſuch as the heir can take without a ſervice. They muſt therefore go to the heir at law: And conſequently, the ſeats in queſtion muſt belong to the purſuer, who has been ſerved *legitima et propinquior heres* to her brother. The clauſe in the diſpoſition, " to his neareſt repreſentatives whatſoever," muſt be interpreted according to law; and as the right of ſitting in a particular ſeat is of an heritable nature, it muſt go to the purſuer, who is heir at law to the defunct.

Anſwered for the defenders, The right in queſtion is of a very anomalous nature, and ſuch as is not known in law. It is neither properly an heritable nor yet a moveable right; and ſo the rules of law, diſtinguiſhing what rights go to heirs, and what to executors, cannot apply to it. And there appears to be as good reaſon, that the younger children ſhould be allowed to continue their father's poſſeſſion of a ſeat in the church, as that the eldeſt ſon ſhould take the whole, more eſpecially when there is a ſeat for every one of them. The words of the diſpoſitions put this paſt all doubt, by which the ſeats are given, not to the heirs entirely, but to neareſt repreſentatives whatſoever, reſiding within the town and pariſh of *Dundee*. This is a particular deſtination, and muſt have its effect.

" The Lords having conſidered the diſpoſitions produced, by which " the ſeats in the church of *Dundee* are granted, not to heirs ſimply, but to the grantee, his heirs and other neareſt repreſentatives whatever, reſiding within the town or pariſh of *Dundee*; " in reſpect it is not denied, that the ſeats in queſtion were diſponed in the ſame terms, and that it is not denied, that the ſeat poſſeſſed by the purſuer is ſufficient to contain her family, aſſoilzied the defenders; and decerned." P. M.

Act. *Maclaurin.* Alt. *Scrymgeour.* Clerk, *Home.*

N° CCXXX. 10th *July* 1760.

MARGARET MACKAY,

AGAINST

WILLIAM HERCULES tailor.

One juſtice of peace cannot judge any cauſe.

IN an advocation from the juſtices of the peace, it was *pleaded*, That the decree had been pronounced by a ſingle juſtice; whereas two or more are by law required, for holding a court, or for pronouncing any ſentence.

" The Lords remitted the cauſe to the juſtices of peace, with this inſtruction, That this cauſe ſhould be judged by two or more juſtices of the peace." P. M.

Act. *Wight.* Alt. *Monro.* Clerk, *Juſtice.*

N° CCXXXI.

N° CCXXXI. 10th *July* 1760.

LOCKHART of CARNWATH,

AGAINST

Sir ARCHIBALD DENHAM.

Heirs of entail, though not heirs of line to the laſt infeft, muſt be entered as heirs, not as ſingular ſucceſſors, the ſuperior having acknowledged the entail by a charter and infeftment.

SIR *William Denham*, in the year 1711, executed an entail of his eſtate of *Weſtſhiels*, in favour of himſelf, and a certain ſeries of heirs, under ſtrict irritant and prohibitive clauſes *de non alienando*, *&c.*

In 1726, Sir *Robert*, the firſt inſtitute, having neglected to inſert the proviſions and irritant clauſes of the entail in his general ſervice, was found, by decree of the court of ſeſſion, to have incurred an irritancy, and to have forfeited all right to the eſtate, for himſelf and his deſcendents.

In conſequence of this decree, Sir *Archibald*, the next ſubſtitute, ſerved himſelf heir of tailzie to Sir *William*; and as a part of the eſtate held of Mr *Lockhart*, he took a charter from him, which contained a clauſe, That every heir of entail ſhall be obliged to pay a year's rent for his entry, unleſs he be at the ſame time heir of line to the perſon who died laſt veſt and ſeiſed; and accordingly Sir *Archibald* paid *L.* 200 *Sterling* to Mr *Lockhart*, as a compoſition for a year's rent.

The decree of the court of ſeſſion was reverſed upon an appeal, and the eſtate was adjudged to Sir *Robert Denham*, ſon to the former Sir *Robert*; who likewiſe took a charter from Mr *Lockhart*, containing the ſame clauſe; and the compoſition-money paid by Sir *Archibald* was allowed to him at accounting with Sir *Robert*.

Sir *Archibald* again ſucceeded to the eſtate upon failure of Sir *Robert* and his deſcendants; and Mr *Lockhart* brought a declarator of non-entry againſt him; in which the following queſtion occurred, Whether Mr *Lockhart* was bound to give a charter to Sir *Archibald*, who was not heir of line to Sir *Robert*, the perſon laſt veſted and ſeiſed, without payment of the year's rent, in terms of the two charters containing the clauſes above noticed?

Pleaded for Mr *Lockhart*, Relief is a well eſtabliſhed caſualty of ſuperiority, as old as feudal-rights themſelves. When a ſuperior receives the new vaſſal, he has from the beginning been intitled to a year's rent. As this caſualty was due even when the heir of the former vaſſal was entered, much more was it claimable when a ſtranger was received into the feu. In courſe of time, as the heir was underſtood to have a more favourable right than a ſtranger, this caſualty, in the caſe of an heir, has been reſtricted to a leſſer ſum, according to the nature of the holding; but no ſuch reſtriction has ever taken place in the caſe of a ſtranger. This is a caſualty inherent in the nature of a feu; and which has been confirmed by the conſtant practice of *Scotland*. When the heirs of the vaſſal ſucceed, nothing is paid but a year's

year's feu-duty; but when a ſingular ſucceſſor claims to be entered, he pays always a full year's rent as a compoſition.

This right is underſtood to be ſo well eſtabliſhed in the ſuperior, that the vaſſal can do no deed to hurt or impair it. Thus a ſuperior cannot be obliged to receive a body-corporate as his vaſſal; becauſe there can be no hopes of any future caſualties. Upon the ſame principles, a ſuperior is not obliged to enter a vaſſal under a ſtrict entail, unleſs his former rights and caſualties are reſerved. By ſuch entail the property is locked up; all ſingular ſucceſſors are for ever debarred; and the ſuperior loſes his caſualty of relief. He is well intitled, therefore, to reſerve in the charter which he grants, all his rights and caſualties as they formerly ſtood; that is, a full year's rent when any one who is not heir of line to the laſt perſon in the feu, is called by the will of the entailer. The purſuer has made ſuch reſervation in both the charters above mentioned.

The ſtatute 1685, which authoriſes entails, provides, "That it ſhall "not prejudge his Majeſty as to confiſcations, or other fines; or his "Majeſty, or any other lawful ſuperior, of the caſualties of ſuperiori-"ty which may ariſe to them out of the tailzied eſtate." This puts the matter paſt all doubt, as it provides, that every caſualty which would have been competent to the ſuperior before the entail, ſhall, notwithſtanding thereof, remain unhurt.

Agreeable to this, the purſuer, in both the charters above mentioned, reſerved expreſsly his right to this caſualty; and his vaſſals, particularly the defender, accepted of the charters with this clauſe; and therefore the defender is barred *perſonali exceptione* from objecting to its having effect.

Anſwered for the defender, The preſent queſtion does by no means concern the caſualty of relief. That caſualty only took place when heirs were to be entered; for by the old feudal law there was no method of compelling ſuperiors to receive ſingular ſucceſſors into the feu. In proceſs of time, however, when vaſſals came to be conſidered as proprietors, various methods were deviſed for compelling the ſuperior to admit of ſuch alienations, for payment of the vaſſal's debts, or tranſmitting the eſtate to ſuch heirs as he thought proper. For this purpoſe the act 1469, anent appriſings, and the act 1672, anent adjudications, oblige ſuperiors to receive appriſers and adjudgers, upon payment of a year's rent, not as a relief, but as a compoſition for changing the former inveſtiture. As the grounds of debt upon which theſe appriſings or adjudications proceeded, might be deviſed to what ſeries of heirs the creditors thought proper, the charter which the ſuperior was compelled to grant, behoved to be in favour of that ſeries of heirs; and when the appriſing or adjudication became a title of abſolute property, the ſuperior could not refuſe to admit any of the heirs upon whom the eſtate was ſettled in the charter, upon pretence that they were ſingular ſucceſſors. The ſame method was introduced by the ſtatute 1690, in the caſe of purchaſers of bankrupt eſtates. From an analogy of the ſtatute 1649, truſt-bonds were introduced, by which vaſſals had it in their power to ſettle the ſucceſſion of their eſtates in what manner they thought proper.

This matter was made ſtill more eaſy by the act of the 20th of *George* II. concerning wardholdings; by which it was provided, That in

in all caſes ſuperiors ſhould be obliged to receive diſponees, in terms of the procuratory of reſignation; and therefore it is now underſtood, that no ſuperior can refuſe to grant a charter in favour of any perſon who has obtained a diſpoſition and procuratory of reſignation of lands, whether it is in favour of the diſponee, and his heirs whatſoever, or any other ſeries of heirs whom he has thought fit to call to his ſucceſſion. To this purpoſe Lord *Bankton* gives his opinion, *Book* 3. *tit.* 2. § 10.

The demand made by the purſuer is moſt unprecedented; and no inſtance can be condeſcended on in which ſuch a compoſition has been found to be due. It is evident, therefore, that when once a tailzied ſucceſſion is eſtabliſhed by a new inveſtiture, the ſuperior cannot demand the compoſition of a year's rent from the ſucceſſive heirs, under pretence that they are ſingular ſucceſſors, as not being the heirs of line of the perſon laſt infeft. An heir of the inveſtiture can by no means be looked upon as a ſingular ſucceſſor; and therefore, as the defender is heir of the laſt inveſtiture of the eſtate granted by the purſuer to Sir *Robert Denham*, he is intitled to be entered as an heir, and not as a ſingular ſucceſſor.

The ſtatute 1685 cannot alter the caſe; 1*mo*, Becauſe this is not a caſualty of ſuperiority, but only a perſonal right competent to the ſuperior, for which he can neither enter into poſſeſſion, nor poind the ground, as in other caſualties; and, 2*do*, Becauſe the ſuperior's right is only reſerved as it ſtood before that ſtatute; and it is certain, that at that period he would not have been found intitled to the compoſition now claimed.

The two charters founded on can be of no weight: for the one, taken by the defender himſelf, was totally ſet aſide by the decree of the Houſe of Lords; and the other, taken by Sir *Robert*, cannot bind the defender, who repreſents him in no other way than as an heir of entail.

" The Lords found, That in reſpect the purſuer had acknowledged " the entail, by granting charter and infeftment thereupon, to the " late Sir *Robert Denham*, he was obliged to enter the defender as " heir of entail, and not as ſingular ſucceſſor." P. M.

Act. *Wa. Stuart.* Alt. *Miller.* Clerk, *Juſtice.*

N° CCXXXII. 15th *July* 1760.

HUGH STEWART of *Northwoodſide*,

AGAINST

The TRUSTEES of GEORGE HOUSTON of *Johnſton*.

Action refuſed on a bill which had lain over twenty-ſeven years.

GEorge *Houſton* of *Johnſton* was, in ſummer 1755, charged for payment of a bill of *L.* 15, accepted by him, of date 5th *March* 1728, and payable to *Hugh Stewart* of *Northwoodſide* againſt the 5th day of *May* thereafter.

Mr *Houſton* ſuſpended the charge; but having died before the ſuſpenſion was diſcuſſed, the proceſs was transferred againſt his apparent heir, and certain truſtees named by him in his laſt will to manage his eſtate for behoof of his heir and creditors.

Pleaded for the ſuſpenders, That this bill was not a legal document of debt, as it had lain over for twenty-ſeven years, without diligence done upon it, and had not been homologated by payments of intereſt, or otherwiſe. Beſides, from the circumſtances of the caſe, there is the ſtrongeſt preſumption that this bill was paid and extinguiſhed ſoon after it became due: for it appears, that Mr *Houſton* was proprietor of a conſiderable lime-work in the neighbourhood of Mr *Stewart*'s farm; that he was in uſe to furniſh him in large quantities of lime; and that he ſometimes borrowed ſmall ſums from his neighbour Mr *Stewart*, which were afterwards allowed in accounting for the lime: and, particularly, there is evidence, from a miſſive produced, that not long after the date of the bill in queſtion, *viz.* in *July* 1729, Mr *Houſton* burned ſome kilns of lime for Mr *Stewart*, which were to be delivered to him in payment of certain ſums which he then owed him; probably, among others, the bill in queſtion.

Anſwered for the charger, Bills are probative by act of parliament; and as no preſcription of them is eſtabliſhed, ſhorter than the long preſcription of forty years, they muſt be held as legal documents of debt within that period. The preſumption of payment from the long taciturnity can have no weight in this caſe. Mr *Houſton* was very inexact in his payments; and Mr *Stewart* was unwilling to preſs a friend and neighbour for ſo trifling a ſum. The charger does further aver, that he was in uſe to pay ready money for the lime furniſhed to him by Mr *Houſton*; and the lime-books are not produced to ſhow the contrary: neither is there ſufficient evidence, that the quantity alluded to in the miſſive was actually furniſhed.

"The Lords, in reſpect of the circumſtances of the caſe, found, "That no action lay upon the bill; and ſuſpended the letters *ſim-*"*pliciter.*" I. C.

Act. *Wa. Stewart.* Alt. *Ilay Campbell.*

N° CCXXXIII. 15th *July* 1760.

CHRISTIAN ANDERSON,

AGAINST

ANDREW and WILLIAM ANDERSONS.

Deathbed-diſpoſition effectual to a legatee, if the heir does any thing acknowledging it.

William Anderſon executed a diſpoſition of his lands of *Raſhiegrain* in favour of *William Anderſon*, his brother's ſecond ſon, paſſing by *Andrew*, the eldeſt; burdening him with payment of a legacy of *L.* 50 *Sterling* to *Chriſtian Anderſon*, his niece. This diſpoſition was confeſſedly

confeſſedly executed upon deathbed; and therefore *William*, the diſponee, agreed to give up the lands to his brother *Andrew*. For that purpoſe he executed a deed, by which he renounced and gave up all right or title he could have to the lands by virtue of this diſpoſition, in favour of *Andrew*. After this renunciation, there follows a clauſe, bearing, That in caſe *Andrew* ſhould think proper to make up his titles upon the procuratory of reſignation contained in this diſpoſition, *William* diſpones to him the lands as contained in the ſaid diſpoſition, and aſſigns to him the procuratory, *&c.* He then provides in the following words: "It is hereby declared, That my granting this preſent right and diſ-"poſition to my brother, and his accepting thereof from me, ſhall "not ſubject him or me to the payment of any of the legacies with "which the ſaid diſpoſition is burdened; and particularly, that my "ſaid brother ſhall be obliged to free and relieve me thereof."

Andrew executed the procuratory contained in this diſpoſition; and was thereupon infeft. *Chriſtian Anderſon* brought a proceſs againſt both the brothers, for payment of the legacy left to her by her uncle: and the Lords found *Andrew* liable; but pronounced no judgment with regard to *William*.

Pleaded in ſubſtance for *Andrew*, That the diſpoſition in queſtion was, to all intents and purpoſes, null and void: That it was in his power to have brought a reduction of it; in which caſe, the purſuer's legacy, as well as the reſt of the diſpoſition, would have fallen to the ground: That the method he took to make up his titles to the eſtate, was only intended to ſave the expence of a ſervice, and by no means to ratify or homologate the diſpoſition: That this was declared in the renunciation itſelf, where it was particularly provided, that that deed ſhould by no means be underſtood as an homologation of the legacies: That *Andrew* had a ſeparate right to the lands, which he virtually made uſe of when he compelled *William* to grant the renunciation in queſtion.

Anſwered for the purſuer, That deeds executed upon deathbed are not *ipſo jure* null, but only reducible at the inſtance of the heir: That *William*, by conveying the procuratory to *Andrew*, ſubjected himſelf to payment of the legacies; and *Andrew*, by accepting of this conveyance, became bound as his ſucceſſor whatſoever: He undoubtedly accepted of the deed, becauſe he took infeftment on the precept of ſeiſin therein contained; and upon that title poſſeſſes the lands of *Raſhiegrain* to this day: That the declaration contained in the diſpoſition cannot be regarded; for that the defender cannot pretend to take advantage of the diſpoſition, and at the ſame time refuſe to ſubmit to the burdens therein contained.

"In reſpect that *Andrew Anderſon* made up his titles to the lands "upon the diſpoſition in queſtion, and poſſeſſes thereupon, there-"fore find him liable to the purſuer in payment of the legacy of "*L.* 50 *Sterling*, with annualrent and penalty, as contained in the "diſpoſition made by *Raſhiegrain*." P. M.

Act. *Sir Dav. Dalrymple.* Alt. *Swinton.* Clerk, *Kirkpatrick.*

N° CCXXXIV.

N° CCXXXIV. 16th *July* 1760.

JANET INGLIS,

AGAINST

DAVID MILLER.

Though a legacy falls by the predeceaſe of the legatee, yet, if heirs are named, the heir takes it upon his ſurvivance; and though he dies afterwards without making up titles, the legacy will fall to his neareſt in kin, and not to thoſe of the firſt legatee.

John Chalmers of *Corſehill* diſponed his eſtate to *John Chalmers* writer in *Edinburgh*, with the burden of a legacy of *L.* 100 *Scots* to *Iſabel Inglis*, her heirs, executors, or aſſignees. *Iſabel* died before the teſtator; but left a ſon *Richard Miller*, who ſurvived the teſtator, but died without making up any titles to the legacy.

After his death, *David Miller*, his father, confirmed himſelf executor to *Richard*, and gave up this legacy in the inventory. *Janet Inglis*, ſiſter to *Iſabel*, having confirmed herſelf executrix to her *qua* neareſt of kin, brought a proceſs againſt *John Chalmers* for payment of this legacy; and *Chalmers* raiſed a multiple-poinding.

Pleaded for *Janet Inglis*, As *Richard Miller* died without making up any titles, the legacy was never ſo veſted in him as that it could tranſmit to his executor. *David Miller*'s confirmation, therefore, as neareſt of kin to his ſon, cannot convey to him what did not belong to his ſon; but the legacy muſt go to *Iſabel Inglis*'s executors, by confirmation or otherwiſe. Had this legacy been left to *Iſabel Inglis*, and failing of her, to her ſon *Richard nominatim*; upon *Richard*'s ſurviving his mother, the legacy would have gone to his neareſt of kin confirming executor to him. But the legacy is left to *Iſabel Inglis*, her heirs, executors, and aſſignees; and therefore a title muſt be made up to it by confirmation, in order to veſt the right in the executor confirming, ſo as to tranſmit the right to his executors; and if the neareſt of kin die without making up his titles by confirmation, he can tranſmit no right to his neareſt of kin, but that debt muſt be taken up, as is done in this caſe, by the neareſt of kin who ſhall confirm executor to *Iſabel Inglis*. Her ſon *Richard* never was her executor; but *Janet Inglis* is confirmed in that office, and therefore muſt be intitled to the legacy in queſtion.

Pleaded for *Miller*, As *Iſabel Inglis* died before the teſtator, the legacy never belonged to her, and therefore cannot be taken up by confirmation, as *in bonis* of her. It is left to her, and to her heirs and executors: failing of her, therefore, they come in as legatees or conditional inſtitutes, and muſt take in their own right, and not through her by confirmation. Agreeable to this doctrine, *Voet* gives his opinion, in the *tit. De mortis cauſa donationibus*, § 7. where he expreſsly conſiders the heirs of the firſt legatee as being themſelves alſo legatees. A confirmation to *Iſabel*, therefore, would be entirely inept, and could be of no other uſe, but to demonſtrate, that *Richard* was neareſt of kin and executor

executor to his mother. But neither a ſervice as heir, nor confirmation as executor, are required in the law of *Scotland*, *ad factum demonſtrandum*, where no ſubject is to be carried by them. Thus it was expreſsly decided, *Houſton* of *Johnſton* againſt *Nicolſon* of *Carnoch*, 28th *January* 1756.

As therefore this legacy never belonged to *Iſabel Inglis*, becauſe ſhe did not ſurvive the teſtator, no confirmation to her was neceſſary. *Richard Miller* had right to this legacy as legatee; and there is no doubt, that where a legacy is due, it tranſmits, though the legatee die before confirmation, in the ſame manner as an executor who is appointed univerſal legatee, though dying before confirmation, tranſmits his right to his executors.

"The Lords found, That the legacy in queſtion having been left to "*Iſabel Inglis*, her heirs, executors, or aſſignees, did not become "caduciary by her predeceaſing the teſtator; but found, That "the ſame did fall and belong to *Richard Miller* her ſon, as "conditional inſtitute; and found, That the legacy is now effectually carried by the confirmation of *David Miller*, as executor "to the ſaid *Richard* his ſon; and therefore preferred the ſaid *David Miller*, and decerned; and found him intitled to the expences "of the extract." P. M.

Act. *Arch. Murray.* Alt. *Wa. Steuart.* Clerk, *Juſtice.*

N° CCXXXV. 16th *July* 1760.

COUSTON,

AGAINST

TENANTS on the eſtate of *Pitreavie.*

Thirlage of victual *in general, does not comprehend wheat, where the mill is not properly conſtructed for grinding it, and no dry multure in uſe to be paid.*

THE tenants upon the eſtate of *Pitreavie* were aſtricted to the mill of the barony, and their tacks contained the following clauſe: "Binds and obliges him, and his foreſaids, not to abſtract any of his "victual from the *Wood-mill* of *Pitreavie*, but aſtricts himſelf thereto "during his poſſeſſion of the ſaid lands, in the ſureſt form." When theſe tacks were granted, none of the tenants were in uſe to ſow wheat. Of late, however, ſome of them have ſown wheat, and have been in uſe to carry it to be grinded at other mills. *Couſton* the miller brought a proceſs againſt them for abſtracted multures.

Pleaded for the defenders, That at the time the aſtriction was conſtituted, no wheat was in uſe to be ſown in the barony; and conſequently the thirlage could only reach ſuch grain as then grew upon the lands: That in all ſuch caſes, when a new ſpecies of grain has begun to be ſown, it cannot be comprehended under the aſtriction. It is *pleaded*, That a tenant might thus diſappoint the thirlage altogether, by altering

his method of ſowing. This may be a detriment to the proprietor, but will not alter the general rule: for the tenant may in like manner elude the thirlage, by laying down his whole grounds in graſs: and there is no reaſon, why the ſame thing may not be done with regard to wheat.

2*do*, The mill in queſtion is by no means fit for grinding wheat. It is a common corn-mill, which, though it may bruiſe the grain to pieces, is abſolutely unfit for making ſufficient flour. The tenants muſt therefore be at liberty to carry their wheat to other mills, where it can be properly grinded.

Anſwered for the purſuer, The clauſe of aſtriction in the tacks comprehends victual in general; and therefore, though at firſt no wheat was in uſe to be raiſed, it muſt certainly be underſtood to be aſtricted when any of it is raiſed. If the defender's doctrine were well founded, it might be in their power, by changing the grain ſown upon their lands, to diſappoint the thirlage altogether.

2*do*, Though the mill has not a marble mill-ſtone, and is not particularly intended for a flour-mill; yet it is fit enough for the purpoſe of grinding wheat. Much wheat in *Scotland* is grinded by mills of the ſame kind. But if it ſhall be thought, that the mill is not ſo proper for grinding wheat, the purſuer will be ſatisfied, that the defenders be found liable to pay him a certain proportion in name of dry multure, without being liable for any other preſtation.

" In reſpect it is acknowledged by the purſuer, that the mill of *Pit-*
" *reavie* is not fit for grinding wheat, and that no dry multure
" for wheat was ever in uſe to be paid, the Lords aſſoilzied the
" defenders from the multure of the wheat purſued for; and de-
" cerned." P. M.

Act. *Macqueen.* Alt. *Johnſtone.* Clerk, *Forbes.*

N° CCXXXVI. 16th *July* 1760.

JAMES WHARRIE vintner in *Whitehaven*,

AGAINST

The DISTANT RELATIONS of EDWARD WHARRIE.

Import of a reſiduary legacy, left among the teſtator's relations not named in the deed.

Edward Wharrie of *Guildford* in the county of *Surry*, having reſided for many years at *Dumfries*, executed a teſtament, by which he appointed *William Lightbody* of *Liverpool* his ſole executor. He directed him to pay all his debts, and a number of legacies, among which there is one in the following words: " To the three children of *James*
" *Wharrie* vintner in *Whitehaven*, or ſurvivors of them, ſhare and ſhare
" alike, the ſum of *L.* 750 *Sterling*."

After the legacies is the following clauſe: " All which legacies be-
" ing paid, I appoint and ordain my ſaid executor to remit the ſurplus
" of my money to *Andrew Binnie* in the pariſh of *Graitney*, and *Wil-*
" *liam*

" *liam Johnſton* in *Langriggs*, to be by them divided equally amongſt " my relations not herein named; and I appoint the legacies to be " paid, and the ſurplus to be remitted, within year and day after my " deceaſe."

After *Wharrie*'s death, a competition enſued betwixt *James Wharrie* vintner in *Whithaven*, to whoſe children the *L.* 750 had been left, and ſome more diſtant relations of the defunct, for about *L.* 300, which remained after paying the legacies; and for determining the preference of the parties, a multiple poinding was raiſed in the name of *Lightbody* the executor, and of *Binnie* and *Johnſton* the truſtees above mentioned.

Pleaded for the more diſtant relations, That by the very words of the teſtament, it can never be underſtood, that *James Wharrie*, or any other perſon whatever, ſhould be intitled to claim the whole of the money in queſtion. The ſurplus is thereby directed to be divided equally among the defunct's relations not named in the teſtament. It is impoſſible, therefore, that though *James Wharrie* were the neareſt relation, he could pretend an excluſive right to this money.

2*do*, It is clear, that by the words of the teſtament, he is cut out from any ſhare in the ſurplus. It is thereby ſpecially provided, that no perſon named in the teſtament could be intitled to any ſhare. But *James Wharrie* is expreſsly named, and a conſiderable ſum left to his children. Beſides, as he was expreſsly under the teſtator's view, and as nothing is left to him, it is evident, that the teſtator did not mean that he ſhould be intitled to claim any thing farther than the *L.* 750 left to his children.

Pleaded for *Wharrie*, Notwithſtanding the clauſe in the deed, it cannot be pretended, that the ſurplus falls to be divided amongſt the relations of the teſtator to the remoteſt degree. The fair meaning and conſtruction of this clauſe is, that after the legacies are paid, the reſidue is to be divided among ſuch as would have ſucceeded to the defunct *ab inteſtato*, provided they are not named in the will. If, therefore, there is any one perſon who would have excluded all the reſt *ab inteſtato*, he is intitled, in like manner, to take the ſurplus in preference to more remote relations. *James Wharrie* is undoubtedly the defunct's neareſt relation not named in the will; and conſequently is intitled to exclude all the reſt.

2*do*, It could never be the meaning of the teſtator, that no perſon whoſe name is contained in the teſtament ſhould have any title to this ſurplus. The obvious meaning is, that no perſon who is honoured, or receives any thing by the teſtament, could have any title. *Wharrie* certainly has got nothing by the will; and therefore muſt be intitled to a ſhare of the ſurplus. Suppoſe he had been a witneſs to the deed, and conſequently his name therein mentioned, it cannot be pleaded, that he would have been thereby excluded. The caſes are perfectly parallel.

" The Lords having conſidered the clauſe in the teſtament whereby " the reſidue of the defunct's effects, after payment of his debts, " the large legacy to *James Wharrie*'s children, and other lega- " cies therein mentioned, was to be remitted to the truſtees in " *Scotland*, to be by them immediately divided among his rela- " tions not therein named, found, That *James Wharrie* is not inti- " tled, as neareſt of kin, to claim the ſaid reſidue to the excluſion

" of

" of the teſtator's other relations not named in the ſaid teſta-
" ment, among whom the truſtees ſhall divide the ſame; and
" therefore repel the claim of *James Wharrie* in *Whitehaven*, as
" being contrary to the purview of the teſtament." P. M.

For *Wharrie*, *Macqueen*. For *Lightbody*, *Hew Dalrymple*. Clerk, *Forbes*.

N° CCXXXVII. 17th *July* 1760.

LADY CASTLEHILL,

AGAINST

CHRISTIAN WATSON, and ARCHIBALD CAMPBELL her ſon.

A ſimple indorſation of an equivalent debenture preſumes value.

William Biſhop of *Murray*, father to the purſuer, had three precepts upon the treaſury, preceding the union, for *L.* 100 each. In order to obtain payment, he aſſigned them to *John Stuart*, as truſtee for the purſuer. *Stuart* granted a factory to *David Gourlay* writer in *Edinburgh*, authoriſing him to uplift the contents of theſe precepts, and to account to him, or his order. *Gourlay* received a debenture for the ſaid *L.* 300 in his own name; which he indorſed to *John Cuthbert* younger of *Caſtlehill*. Mr *Cuthbert* again indorſed the debenture to *John Watſon*, in the following words. " Pay the contents to *John Wat-*
" *ſon* younger, merchant in *Edinburgh*, or order." It was agreed, that *John Watſon*'s executor afterwards received payment of the full contents of this debenture.

The purſuer, Lady *Caſtlehill*, brings a proceſs againſt the repreſentatives of *John Watſon*, ſetting forth, That the debenture had been indorſed to *Watſon*, without any value, as truſtee for her; and therefore concluding, that his repreſentatives ſhould be decerned to pay her the contents, with intereſt. The only point inſiſted upon in the cauſe was as follows.

Pleaded for the purſuer, The indorſation of this debenture does not bear to be for value; and therefore the preſumption is, that it was only in truſt. Whatever may be the law with regard to bills of exchange, which, by a fiction in favour of commerce, are underſtood to be bags of money, and transferable from hand to hand by ſimple indorſation; yet with reſpect to debentures, and other writs, a ſimple indorſation, ordering payment, can only be conſtructed in law as a mandate to receive, implying an obligation to account, unleſs the indorſation expreſsly bear value received.

It frequently happens, that a number of creditors indorſe their grounds of debt to one perſon, in order to operate payment. When ſuch indorſations do not bear value received, they can only be conſtructed as a truſt; and the indorſee remains bound to account or retroceſs when called upon for that purpoſe. If the indorſation bears value received, the indorſee is then a mandatar *in rem ſuam*; that is, he

he is intitled to receive and diſcharge on his own account, and to apply what is received to his own uſe: but even ſuch indorſation, in the eye of law, is no transfer of the property. On the other hand, an indorſation to a bill, inſtantly conveys the property, as part of the conſtitutional right of bills in the commercial law.

Anſwered for the defenders, The debenture itſelf bears *in gremio*, that it is transferable by indorſement; and it is certain, that the greateſt number of equivalent-debentures were in uſe to paſs by general indorſations of that kind. A ſimple indorſation of a debenture fully conveyed the property to *Watſon*; and he was not bound to account to any perſon. This muſt be the caſe where-ever a writing is transferable by indorſation, except where the indorſation is qualified to be for the behoof of the indorſer.

This doctrine is confirmed by the debentures themſelves, bearing to be transferable by indorſement. As the greateſt part of them were in uſe to be conveyed in this manner, this is a demonſtration that the law was ſo underſtood. It would give riſe to very great confuſion, and many law-ſuits, if every perſon to whom a debenture has been conveyed by a general indorſation of this nature, ſhould be found liable to account for the value.

No reaſon appears for eſtabliſhing a difference betwixt bills of exchange and debentures, as they are equally transferable by indorſement. In both caſes the ſimple indorſation is a mandate *in rem ſuam*; which intitles the indorſee to receive the money for his own account.

The caſe put, of creditors conveying their debts to a common agent, cannot affect the preſent queſtion: for in ſuch a caſe, where the indorſation is not for value, it always bears to be for the behoof of the indorſer; which, without doubt, renders the indorſee accountable.

" The Lords aſſoilzied the defenders; and decerned." P. M.

Act. *Montgomery*. Alt. *Scrymgeour*. Clerk, *Gibſon*.

N° CCXXXVIII. 22d *July* 1760.

ANTHONY and JAMES MACHARGS,

AGAINST

GILBERT BLAIN of *Blainfield*.

In a teſtament executed in Scotland, *carrying effects ſituate in* Antigua, *a reſiduary legacy* to brothers and ſiſters, or other neareſt of kin, *does not comprehend the nephews and nieces of the defunct, while he has brothers and ſiſters alive.*

John Blain, brother of *Gilbert Blain*, and uncle, by the mother, to *Anthony* and *James Machargs*, reſided ſome years as a merchant in *Antigua*; he afterwards ſettled in *Glaſgow*; and, after a few years reſidence there, returned again to *Antigua*; where he lived about twelve years, and died.

During his ſtay in *Scotland*, he executed a latter-will, wrote with his

own hand, by which he appointed his brother *Gilbert* his executor; to whom he bequeathed *L.* 100; to his ſiſter *Marjory*, *L.* 200; and *L.* 100 to *Anthony* and *James Machargs*, his nephews by his deceaſed ſiſter *Jean Blain*. When he left *Scotland*, he committed this will to the care of a friend.

The will contains this clauſe: "And all the reſt, reſidue, and re-"mainder of my effects and eſtate, I leave and bequeath equally a-"mongſt my brethren and ſiſters, or other neareſt of kin that ſhall "be alive at the time of my deceaſe."

John Blain left a very conſiderable moveable eſtate, moſtly acquired after he went laſt to *Antigua*, and ſituate there at the time of his death.

Anthony and *James Machargs* claimed right, not only to the ſpecial legacy bequeathed to them, but alſo to a ſhare of the reſiduary legacy; to which they alledged they were intitled by the above-recited clauſe of their uncle's will, under the deſcription of his *other neareſt of kin*. They brought an action againſt *Gilbert Blain*, the executor nominate, to account to them for their ſhare of the ſaid reſiduary legacy.

Gilbert Blain inſiſted, That the reſidue of the defunct's eſtate belonged to him and his ſiſter *Marjory*, in virtue of the general reſiduary legacy.

Pleaded for the purſuers, The defunct generally reſided in *Antigua*, and there his effects were ſituate at the time of his death. By the laws of *Antigua*, the right of repreſentation in the ſucceſſion to moveables *ab inteſtato* prevails. It is not to be preſumed the defunct had in view to alter this rule; and the words of his will ſeem, agreeable to it, to intend a diſtribution of the reſidue of his effects amongſt his brothers and ſiſters who ſhould ſurvive, and the children of thoſe who ſhould predeceaſe him.

The effects are, by the law of nature and nations, under the diſpoſal of the judge in whoſe juriſdiction they were ſituate at the time of the teſtator's death; it is *ex comitate* if he gives execution to the ſentence of any other judge concerning them; he cannot give ſuch execution but in conformity to the laws of his own country; every plea, therefore, ariſing to the purſuers from the ſituation of the effects, and the law of the country where they were ſituate, ought to be equally good here as in *Antigua*. In the law of *England*, (which takes place in *Antigua*), nephews and nieces are conſidered as *next of kindred* to their deceaſed uncle, as they concur with his brothers and ſiſters in his ſucceſſion; and it is to be preſumed, that the defunct underſtood *neareſt of kin* in that ſenſe.

Anſwered for the defender, *John Blain* was a *Scotſman* born; had paſſed moſt of his life in *Scotland*; was ſettled merchant in *Glaſgow*, when he made his will; all or moſt of his effects were then in *Scotland*; his teſtament was executed in the language, and according to the forms of the law of *Scotland*; and it cannot be imagined, that he intended any rule of ſucceſſion, or any conſtruction of the words of his will, different from that of the law of *Scotland*. He bequeathed the reſidue of his eſtate *to his brothers and ſiſters, or other neareſt of kin*. The only poſſible conſtruction of theſe words is, That his brothers and ſiſters, if any ſurvived him, and failing all them, his neareſt of kin, ſhould ſucceed to the reſidue of his eſtate; which neceſſarily excludes

cludes the purſuers, who are neither brothers nor ſiſters, nor neareſt of kin, while a brother and ſiſter are alive.

If *John Blain* had died upon his voyage from *Glaſgow* to *Antigua*, it cannot be doubted, that the purſuers would have been excluded from his ſucceſſion; and the legal ſenſe and conſtruction of his teſtament cannot ſurely be varied by the accidental increaſe, or change of ſituation, of his effects. Such change might alter his ſucceſſion *ab inteſtato*, according to the laws of the different countries where his effects happened to be ſituate at the time of his death; but could never alter the import of his teſtament; which muſt always be underſtood according to the ſenſe of the law of the country where it was executed.

It is improper to argue from the rules of ſucceſſion *ab inteſtato*, or preſumed intention of the defunct, when his expreſs will directs the diſtribution of his eſtate. The obſervations upon the law of nature and nations, and the power of the magiſtrate to diſtribute the effects of a defunct ſituate in his juriſdiction, according to the law of the country, are entirely miſapplied to this caſe. If *John Blain* had died inteſtate, his effects ſituate in *Antigua* would have been diſtributed according to the legal courſe of ſucceſſion there; but as he made a will, if the matter was to be judged in *Antigua*, it could not be determined according to the rules of ſucceſſion *ab inteſtato*, but according to the words of the will. By the law of every country, the will of the defunct is the ſovereign rule of his ſucceſſion; and if any thing is doubtfully expreſſed in the teſtament, it muſt be explained according to the acceptation of the words in the country where, and according to whoſe forms, it was executed. It cannot be imagined, that the defunct uſed the words *neareſt of kin*, not in the ſenſe of the law of his own country, but of the law of *England*, of which there is no reaſon to believe he had the leaſt knowledge.

" The Lords found, That after payment of the ſpecial legacies con-
" tained in the teſtament, the reſidue of the eſtate and effects of
" the defunct belonged to the defender, and his ſiſter *Marjory*;
" and therefore aſſoilzied the defender." W. N.

For the purſuers, *J. Craigie, Ferguſon.* Alt. *Miller.*

N° CCXXXIX. 22d *July* 1760.

JOHN MACARTHUR,

AGAINST

DAVID BRUCE.

Arreſtment of goods contained in lockfaſt trunks and packages, being looſed, upon caution, and the goods afterwards given up by the arreſtee to the common debtor, without any inventory or appretiation, the cautioner in the looſing found liable to the arreſter to the extent of the debt upon which the arreſtment was uſed.

John Macarthur, as executor nominated by *Ludovick Grant*, brought a proceſs, in his own name, and in that of *Eliſabeth Leſlie*, a creditor

ditor of the ſaid *Ludovick Grant* in a bond of *L.* 150, againſt *Barbara* and *Grizel Grants*, his ſiſters; alledging, That, upon their brother's death, they had clandeſtinely intromitted with and carried off ſundry moveable effects belonging to him; and therefore concluding againſt them, as vicious intromitters, to reſtore the ſaid effects, or to make payment of *L.* 150 *Sterling* as the value of the goods.

In this proceſs compearance was only made for *Barbara*; and ſhe having acknowledged her intromiſſion with certain particulars of furniture, and other effects, of which a condeſcendence was given in to proceſs, but the values of which were not aſcertained, ſhe was decerned, by decreet of the court of ſeſſion, to return the ſaid goods to the purſuer. —— It was further *alledged*, That about the time of her brother's death, ſhe intromitted with *L.* 22 *Sterling* of caſh, which was then lying by him. To this ſhe made no anſwer, but withdrew her compearance; upon which ſhe was alſo decerned to make payment to the purſuer of the ſaid *L.* 22. —— Mrs *Grizel*, the other ſiſter, was decerned in abſence, as a vicious intromitter with her brother's effects, to reſtore the money, goods, gear, and effects, intromitted with by her; or otherwiſe to make payment to the purſuer of *L.* 150 *Sterling*, with intereſt and penalty, in terms of the libel.

During the dependence of that proceſs, the purſuer having learned that the ſiſters had conveyed certain trunks and packages, containing effects belonging to their deceaſed brother, to the warehouſe of *Robert Grant* merchant in *Leith*, he immediately arreſted the ſame in the hands of *Robert Grant*. Upon which, the two ſiſters having applied for a looſing of the arreſtment, *David Bruce*, writer in *Edinburgh*, became cautioner, in common form, "That the goods and effects arreſt-"ed in the hands of *Robert Grant*, at the inſtance of *John Macarthur*, "ſhould be made forthcoming to the ſaid *John Macarthur*, in caſe, "at diſcuſſing the proceſs raiſed at his inſtance againſt Mrs *Barbara* "and *Grizel Grants*, it ſhould be found, that they ought to reſtore the "goods, gear, and effects, or make payment of the ſums of money "therein libelled." And the arreſtment being accordingly looſed, the cheſts, *&c.* were given up by *Robert Grant* to the two ſiſters, without looking into them, or having any knowledge of the contents.

Macarthur thereupon commenced a proceſs againſt *Bruce*, the cautioner, ſubſuming on the above facts; and concluding againſt him for reſtitution of the ſeveral goods which *Barbara Grant* had been ordained to reſtore, and the *L.* 22 *Sterling* in which ſhe had been found liable; and likewiſe to reſtore the money, goods, and effects, which had been intromitted with by *Grizel*; or to make payment of the ſum of *L.* 150 *Sterling*, with annualrents, *&c.* in terms of the decreet againſt her.

The Lord Ordinary "found the cautioner *David Bruce* liable in pay-"ment of the ſum of *L.* 150 *Sterling* to the purſuer." But the cauſe having been afterwards reported, Mr *Bruce* inſiſted in the following defences.

1*mo*, The defender can be no further liable than to make the arreſted goods forthcoming, or pay their values as they ſhall be aſcertained by the purſuer. The effect of an arreſtment of goods is only to attach them in the hands of the perſon in whoſe poſſeſſion they happen to be, and thereby to ſubject him to the obligation of making theſe goods

goods forthcoming, or ſo much thereof as ſhall be equal to the debt upon which the arreſtment is uſed. The arreſtee can never be made further liable, unleſs he has been guilty of unwarrantable breach of arreſtment; and when a perſon becomes cautioner in a looſing, the nature of ſuch obligation is, that he becomes bound in the ſame manner, and to the ſame extent, that the arreſtee would have been if the arreſtment had not been looſed. The purſuer, therefore, in this action, concludes improperly. The defender has no concern with the extent of the ſums decerned for againſt *Barbara* and *Grizel Grants*; he is only obliged to make the goods forthcoming which were arreſted in *Robert Grant*'s hands, or to account for the values thereof, in the ſame way as *Robert Grant* himſelf would have been had the arreſtment not been looſed. The ſole effect of the defender's becoming cautioner was, to ſubſtitute him in *Robert Grant*'s place; and it is incumbent upon the purſuer to aſcertain what was the value or extent of the goods arreſted. To that extent only the defender is liable, by the nature of the tranſaction, as well as the expreſs words of the bond of cautionry above recited. —— Agreeable to this doctrine, the Lords have decided, that the cautioner in a looſing of arreſtment can be decerned to pay no more than what appears, from the oath of the arreſtee, to have been then owing by him; *Durie*, 21ſt *June* 1726, and 2d *February* 1727, Lord *Balmerino contra* Laird of *Lochenvar*.

It is true, that in this caſe the goods arreſted were contained in lockfaſt trunks; and *Robert Grant*, who has been examined upon oath, ſays, he is ignorant of the value of the goods. But this circumſtance ought not in reaſon to make any difference: the defender knew nothing about the goods being contained in any locked repoſitories; he did not think it incumbent on him to take any inventory of theſe goods; and as he was certainly guilty of no unlawful act, in becoming cautioner in common form in the looſing of an arreſtment, it would be very hard to ſubject him to the purſuer's whole debt, however conſiderable, and however far exceeding the value of the goods, merely from this reaſon, that they were given up without any inventory being made of them. —— Suppoſe the purſuer had uſed an arreſtment in the hands of a debtor to *Barbara* or *Grizel Grant*, whoſe debt could be no otherwiſe inſtructed but by the debtor's oath; that the defender had become cautioner in common form for looſing the arreſtment; and that in the mean time the arreſtee had died, ſo that the mean of proof for eſtabliſhing his debt was loſt: it could not in ſuch caſe have been maintained, that it was the defender's duty, when he became cautioner in the looſing, to have inquired, and informed himſelf, what was the preciſe extent of the debt arreſted, or that he would have been ſubjected in payment of the whole debt upon which the arreſtment was uſed. —— Beſides, in the preſent caſe, it cannot be ſaid, that the proof of the value of the goods arreſted has become impracticable; the value and extent of them may ſtill be proved by the oaths of *Barbara* and *Grizel Grants*, to whom they were delivered up; and while that mean of proof remains, it would be hard to ſubject the defender in payment of the whole debt ſaid to be due to the purſuer.

2*do*, The defender cannot be made liable in *L.* 150, upon the decreet, as obtained either againſt Mrs *Barbara Grant*, or againſt Mrs *Grizel*. For with regard to Mrs *Barbara*, ſhe is not found liable in

L. 150, but only to reſtore certain particulars of furniture contained in an inventory or condeſcendence, and to make payment of *L.* 22 *Sterling* of caſh ſaid to have been intromitted with by her; which laſt part of the interlocutor was in abſence, and without proof. And with regard to *Grizel*; tho' ſhe is indeed found liable in *L.* 150 *Sterling*, as the value of the goods ſuppoſed to have been carried off by her; yet, as the decreet *quoad* her was entirely in abſence, ſo it is ſtill competent to her to reduce that decreet, unleſs proper evidence be brought of her intromiſſion: and if ſo, it is equally competent to the defender to reduce that decreet; or, even without the form of a reduction, to object to it in this proceſs, as obtained againſt her without evidence.

Anſwered for the purſuer, There is no occaſion to diſpute the general principle aſſumed by the defender, That an arreſtment can carry no more than what is in the arreſtee's hands at the time of laying it on; and that, if there is no other mean of proof to aſcertain the value or amount of the ſubject arreſted, recourſe muſt be had to the arreſtee's oath. But the preſent caſe is ſomewhat particular. It is a fact admitted on all hands, that the ſubjects arreſted were trunks full of goods, the contents unknown; and as, by looſing the arreſtment, whereby the ſiſters were allowed to poſſeſs themſelves of the goods, it is now rendered impracticable to prove the extent or value of them, the law muſt preſume, that they were in value equal to the ſums for which the arreſtment was uſed. — The matter is not otherwiſe extricable. And if the defender's plea were to be liſtened to, all ſuch arreſtments might be evacuated, and rendered of no effect. —— The purſuer can have no decreet againſt the arreſtee, as the looſing the arreſtment warranted him as effectually to deliver up the goods, as if no arreſtment had ever been uſed; ſo that any difficulty which now occurs in aſcertaining the value of the goods, ariſes from the defender's neglect, in allowing the ſiſters to poſſeſs themſelves of theſe effects without inventory or appretiation.—— The purſuer cannot agree to hold the oaths of the ſiſters as a proper mean of proof, for aſcertaining the quantum and value of theſe goods. This would be a moſt dangerous precedent, as they are plainly intereſted to conceal and depretiate the goods.—— The law will preſume, that the defender knew the goods arreſted to be at leaſt of equal value with the ſums for which the arreſtment was uſed, otherwiſe he would not have allowed them to be given up, without uſing ſome precaution for aſcertaining their value: he knew that the purpoſe of looſing the arreſtment, was to put the ſiſters in poſſeſſion of the goods; and if he did not previouſly know their value, it was his duty to have inventoried and appretiated them.

With regard to the other defence, founded on the objections to the decreet againſt the two ſiſters; in the *firſt* place, It is clearly proved by the depoſitions of a variety of witneſſes examined in that proceſs, and by Mrs *Barbara*'s own confeſſion, That ſhe had a conſiderable intromiſſion with her brother's effects; and ſhe was accordingly ordained to reſtore them. Thoſe goods which ſhe acknowledged to have been in her poſſeſſion, were, to appearance, of conſiderable value; but it has now become impoſſible to aſcertain the preciſe worth of them, becauſe they have been carried away and diſpoſed of by the ſiſters, which they had acceſs to do by the defender's looſing the arreſtment: And therefore, as it has become impoſſible, either for Mrs *Barbara* or the defender, to reſtore the identical goods, or values of them, he muſt be liable in the alternative

alternative which the purſuer concluded for in that proceſs, of *L.* 150 *Sterling*, as the ſuppoſed value of the goods abſtracted. 2*dly*, With regard to *Grizel*, though it is true, that the decreet *quoad* her was in abſence, yet this does not alter the caſe: for the two ſiſters, by joining in an application to have the arreſtment looſed, did acknowledge their joint intereſt in the goods arreſted; and the conſequence of the looſing was, that they poſſeſſed themſelves of and carried away theſe goods, without inſpection or inventory: and as the defender, by interpoſing his cautionary ſecurity, without any notice or intimation to the purſuer, and without any precaution taken for aſcertaining the particulars or values, ſuffered the goods themſelves to be withdrawn, the preſumption of law is, that theſe goods were acknowledged to be of ſuperior value to the ſums libelled; and conſequently, as the defender has rendered it impracticable to ſay, what was the value or extent of the goods themſelves, he muſt be liable in their preſumed value of *L.* 150.——The defender cannot be in a better caſe than *Grizel* herſelf, were ſhe inſiſting in a reduction of that decreet; and as by taking the goods out of the arreſtee's hands, and diſpoſing of them, it has been rendered impracticable to prove the preciſe value of them, it would be impoſſible for her to prevail in ſuch reduction; and therefore the defender, who gave her an opportunity of ſo doing, muſt be liable in terms of the decree that ſtands againſt her.

" The Lords adhered to the Lord Ordinary's interlocutor; but remit-
" ted to his Lordſhip to hear parties procurators upon any objec-
" tions that might be to the decreet againſt *Grizel Grant*."

N.B. The cauſe having come back to the Lord Ordinary, the above objection was again ſtated by the defender to the decreet againſt *Grizel Grant*; to which the purſuer having made anſwer as above, the Lord Ordinary, upon the 21ſt *February* 1761, " repelled the objections, and " allowed the decreet formerly pronounced to be extracted." —— And the Lords, upon adviſing a reclaiming petition and anſwers, upon the 8th *July* 1762, adhered. I. C.

Act. *Macqueen* and *Lockhart*. Alt. *Da. Græme*. Clerk, *Kirkpatrick*.

N° CCXL. 24th *July* 1760.

EARL of HOME,

AGAINST

STEPHEN BROOMFIELD.

In an application to the commiſſioners of ſupply, for dividing the valuation of lands which are charged in cumulo *in the ceſs-books, not neceſſary to make the ſuperior a party.*

Stephen Broomfield was proprietor of certain lands holding of the Earl of *Home*, and of other lands holding of the crown, all lying in the ſhire of *Berwick*.

Broomfield

Broomfield applied to the commiſſioners of ſupply, ſetting forth, That all his lands were charged in the ceſs-books *in cumulo*; and craving, That the ceſs of the reſpective lands ſhould be divided in proportion to the real rent. The commiſſioners took a proof, and pronounced a decreet of diviſion.

The Earl of *Home contended*, That by this decreet, the lands holding of him were valued too low; and brought a reduction of it upon this, amongſt other grounds, That it was null, in reſpect the Earl, the ſuperior, was not made a party to the proceſs of diviſion before the commiſſioners of ſupply; and he *inſiſted*, That as freehold qualifications are now eſteemed a valuable property, and as the tendency of the proceſs of diviſion was to reſtrict the valuation of the lands of which he was ſuperior, he had a manifeſt intereſt in the queſtion, and ought to have been made a party.

Anſwered for *Stephen Broomfield*, No law requires, that ſuperiors be called in diviſions of valuation. The acts of convention, and acts of parliament, which authoriſe commiſſioners of ſupply to make ſuch diviſions, mention no ſuch thing: and the univerſal practice proves, that it is not neceſſary. The crown is ſuperior of all the lands in *Scotland*; and yet the officers of ſtate are never called in diviſions of valuation. If then it were neceſſary to call the ſuperior, all diviſions hitherto made would be void.

" The Lords repelled the reaſons of reduction." W. N.

For the Earl of *Home*, *Lockhart*. Alt. *Ferguſon*. Reporter, *Auchinleck*, Clerk, *Kirkpatrick*.

N°CCXLI. 29th *July* 1760.

JOHN ROBERTSON, and other executors of JAMES MACCOMIE merchant in *Aberdeen*,

AGAINST

ISABEL and RACHEL STRACHANS.

If an executor confirmed received ſufficiency of funds for payment of both debts and legacies, the legatees are not liable in repetition to the creditors upon his inſolvency.

William Strachan ſenior merchant in *Aberdeen*, in 1745, granted bond to the executors of *James Maccomie* for *L.* 1000 *Scots*.

Strachan died in 1747; when it appeared, that he had, as early as the 1735, made a teſtament, by which he appointed his wife *Rachel Baxter* to be his ſole executrix; " and, after payment of his debts, he " *legated* to his two ſons, *William* and *James*, two third parts of his " haill effects; and to his two daughters, *Iſabel* and *Rachel*, the other " third part thereof."

Rachel Baxter having predeceaſed her huſband, no confirmation was expede on the teſtament; but *William*, the eldeſt ſon, was confirmed executor *qua* neareſt in kin to his father. In the inventory, the debts contracted by the defunct, in a copartnery with his ſon, the executor,

executor, were deduced; but *Maccomie*'s debt was not: and the ſum confirmed amounted to *L.* 700 *Sterling*, beſides ſome heritage, which was collated by *William*.

Iſabel Strachan had, before her father's death, received at her marriage 3000 merks; and *William*, the executor, afterwards paid her *L.* 100 *Sterling* in full of her ſhare. To *Rachel* he granted bond, in 1749, for *L.* 240, as her proportion; which he afterwards paid in *September* 1754. To his brother *James* he alſo paid, or granted ſecurity, for his ſhare.

After all theſe payments, there remained a ſufficient fund in his hands, both to anſwer the defunct's debts, and the proportion provided to himſelf.

William Strachan likewiſe made ſundry partial payments of the debt due to *Maccomie*'s executors; whereby it was reduced, in the 1754, to a balance of *L.* 383 : 6 : 8 *Scots*.

Towards the end of *September* 1754, *William Strachan*'s affairs went into diſorder, and he became bankrupt.

Maccomie's executors thereupon brought an action, not only againſt the cautioners in *William*'s confirmation, as executor to his father, but alſo againſt *James*, *Iſabel*, and *Rachel Strachans*, as repreſenting their father, on the paſſive titles, or as having intromitted with his effects, for payment of the balance of the ſaid debt: but *James Strachan* died during the dependence.

Pleaded for the purſuers, 1*mo*, *William Strachan* was not confirmed executor upon his father's teſtament, but as next of kin; and the defenders ſtood in equal degree with him, and drew their ſhares as ſuch. He was only their truſtee, and therefore all ſhould be liable, as if they had been conjoined in the office. 2*do*, One to whom a certain ſhare, ſuch as a third or fourth of the defunct's effects, is bequeathed, is termed a *legatarius partiarius*, and is liable *in valorem* for the teſtator's debts; and ſuppoſing the teſtament to have been here followed as the rule, the defunct therein expreſsly provided, that his children ſhould only be paid their ſhares after his debts were cleared; which made thoſe debts a burden on their ſhares. And, 3*tio*, Legacies of all kinds are only due *deductis debitis*, in ſo much that if an executor has made payment *bona fide* to the legatees, and creditors of the defunct afterwards claim, an action of repetition lies againſt the legatees proportionally; *Stair*, *tit. Executry*, § 70.

Pleaded for the defenders, 1*mo*, The predeceaſe of the executor nominate did not invalidate the teſtament; but any of the legatees might have confirmed upon it; and although the eldeſt ſon confirmed as next of kin, yet the teſtament was the rule obſerved in ſettling the childrens proportions of the funds. The perſon who is confirmed as executor, whether as nominate or as neareſt of kin, comes to have the ſole adminiſtration, as repreſenting the defunct, and is alone liable to the defunct's creditors. 2*do*, A legacy, indeed, is not due unleſs there be a ſufficient fund for the payment of it, after deducing the defunct's debts; but if there be a ſufficient fund, as there was in this caſe, and the legacy is accordingly paid, the ſubſequent inſolvency of the executor, without clearing the defunct's debts, although he was left ſufficient for doing it, cannot ſubject the legatee, even though he ſhould be one of the defunct's children; becauſe ſuch legatee does

not take by ſucceſſion or intromiſſion, but by gift, and the defunct had the abſolute diſpoſal of the free effects, after deducing his debts. This teſtament did not burden the legatees with the payment of debts, but only declared their legacies to be a proportion of the free ſurplus, after deducing debts, and they received no more. And, 3*tio*, Legatees receiving their money in this way think themſelves *in bona fide* to uſe it, and have no action to oblige the executor to apply the funds retained, for payment of the debts; and it would be very hard, if the creditors, by neglecting to claim payment from the executor while ſolvent, ſhould have it in their power to ſubject the legatees, at a great diſtance of time, to make good the debts out of the money they had thus *bona fide* received, and perhaps conſumed.

" The Lords aſſoilzied *Iſabel* and *Rachel Strachans*." D. R.

Act. *D. Rae.* Alt. *Johnſtone.* Clerk, *Pringle.*

N° CCXLII. 30th *July* 1760.

JOHN BONNY,

AGAINST

DAVID MORRIS.

Whether the true proprietor who poſſeſſed as tenant under a bona fide *poſſeſſor, muſt account to him for the rents in his hand?*

THomas *Bonny* was proprietor of a ſmall eſtate, and died without iſſue.

William Bonny, the eldeſt ſon of *John Bonny*, who was brother-conſanguinean to *Thomas*, was ſerved heir to his uncle *Thomas*; and dying, was ſucceeded by his brother *John Bonny*, the purſuer, then an infant, who was ſerved heir to him, and infeft.

Thomas Bonny, at his death, left a ſiſter-german, *Janet Bonny*, mother of *David Morris*, the defender.

David Morris poſſeſſed a part of the lands for ſeveral years as tenant, in virtue of a written agreement by him, and ſome others of the purſuer's neareſt relations; whereby they agreed, that, to ſave the expence of ſerving a tutor in law, each of them ſhould poſſeſs a part of the purſuer's lands, at a certain rent, during his minority, for his behoof.

John Bonny was, for ſeveral years, ſuppoſed proprietor of the lands; but at length it was diſcovered, that his title was null; that *William Bonny*, who was nephew to *Thomas* only by half-blood, had been erroneouſly ſerved heir to him, as his neareſt heir was *Janet*, his ſiſter-german. Upon this *Janet Bonny* was ſerved heir to her brother *Thomas*; and mutual proceſſes being brought before the court of ſeſſion, (during the dependence of which, *Janet Bonny* having died, was ſucceeded by her ſon *David Morris*), the Lords found, " That *Janet Bonny* was ſiſter-german, and neareſt heir, to *Thomas Bonny*; and that " *David*

" *David Morris*, in the right of his mother, had right to the ſubjects " in queſtion."

Thereafter *John Bonny inſiſted*, That *David Morris* ſhould account to him for the rents which were in his hand, of that part of the lands which he had poſſeſſed as tenant, for the behoof of *John Bonny*, while he was ſuppoſed proprietor.

Pleaded for the purſuer, That as he ſtood infeft in the ſubject as proprietor, he was intitled to the rents till his right was ſet aſide. If the rents had been uplifted, he would not have been obliged to repeat them; and their happening to lie in the tenant's hand ought to make no difference. The rule of the Civil law, which is adopted into ours, was, *Bonæ fidei poſſeſſor fructus perceptos et conſumptos ſuos facit, et non cogitur reſtituere conſumptos quantumvis iis ſit factus locupletior;* and as the fruits, how ſoon they are conſumed, belong to the *bona fide* poſſeſſor, it can make no difference whether they were conſumed by himſelf, or by his tenant.

It was in the character of one of the pro-tutors for the purſuer that *David Morris* took the poſſeſſion; as ſuch it was his duty, to lay out regularly, for the purſuer's behoof, the rents of the lands of which he kept the poſſeſſion himſelf, in the ſame manner as he ought to have uplifted, and laid them out, if he had ſet the poſſeſſion to another tenant; and if he neglected to do what his duty as protutor obliged him to, he cannot reap a benefit from that neglect.

Anſwered for the defender, The ſtrict rule of law is, That he who is found to be proprietor has a right to vindicate his property, in whoſe hands ſoever it may be; and a right to all the fruits or rents muſt go along with the right of the lands. The law has wiſely admitted a mitigation of this rule, from conſiderations of humanity, to prevent the hardſhip of making one reſtore what he had received, and made uſe of, believing it to be his own; but no law can allow a perſon who has no right, to evict from the true proprietor rents that are *in medio*.

The defender never acted as pro-tutor for the purſuer. He agreed, for his advantage, when an infant, to become tenant in a part of the lands, and to pay for them a certain rent; but as there was no perſon intitled to receive the rent, the defender was from neceſſity obliged to retain it in his hand till the minor ſhould be of age. The true proprietor has right to recover his rents where-ever he finds them *in medio*, in the hands of tenants, and muſt of conſequence have right to retain them when in his own hand.

" The Lords found the defender *David Morris* liable to account for " the rents in queſtion." W. N.

Act. *Macqueen.* Alt. *Macintoſh.* Clerk, *Gibſon.*

N° CCXLIII.

N° CCXLIII. 1st *Auguſt* 1760.

GEORGE BEAN, Deputy ſheriff-clerk of *Aberdeen*,

AGAINST

RACHEL STRACHAN, daughter of *William Strachan ſenior* merchant in *Aberdeen*.

Payment made by a bankrupt debtor, without fraud on the part of the creditors, is not challengeable at common law, or on the acts 1621 *and* 1696.

William Strachan junior merchant in *Aberdeen*, being debtor to his ſiſter *Rachel Strachan* in a bond for *L.* 240, (as mentioned in a preceding caſe, N° CCXLI.), and finding his affairs in a deſperate ſituation, he, in the beginning of *September* 1754, was adviſed by a friend, whom he conſulted on the occaſion, to raiſe money by diſcounting bills which he then had, and to apply the proceeds for payment of his ſiſter's bond, which had been granted for her proportion of her father's effects.

Accordingly, by the aſſiſtance of his ordinary agent, who did not know his real ſituation, he got bills diſcounted to the amount of *L.* 272 *Sterling*; and with that money he paid his ſiſter the principal and intereſt due on the above bond, and on a ſeparate note, amounting together to *L.* 260 *Sterling*: But it did not appear, that he then explained to her the ſtate of his affairs, or that ſhe knew in what manner he had raiſed the money.

This happened on the 2d of *September*, and immediately thereafter *William Strachan* abſconded. On the 14th of that month he was apprehended on a warrant of the ſheriff, at the application of his creditors; and horning and caption were, within the ſixty days, raiſed againſt him. On the 16th of *September* he granted a diſpoſition *omnium bonorum* to truſtees for behoof of his creditors; to which almoſt all of them acceded, (particularly *George Bean*, a creditor in about *L.* 50), and received a dividend far ſhort of paying their debts.

George Bean afterwards uſed arreſtment in the hands of ſundry perſons, particularly of *Rachel Strachan*; againſt whom he inſiſted in a forthcoming, upon this ground, That ſhe had improperly received payment of her bond from her brother when bankrupt. Upon a proof, the facts appeared as already ſtated.

Pleaded for the purſuer, *Rachel Strachan* lived in family with her brother, before and at the time of his bankruptcy, ſo could not be ſuppoſed altogether ignorant of his affairs; and the method taken for giving her an unjuſt preference, by getting bills diſcounted, and then paying over to her the money, when he well knew he was utterly inſolvent, and within ſixty days of his notour bankruptcy, was a fraudulent device, which muſt be preſumed to have been contrived between them for eluding the effect of the act 1696. Therefore ſuch

tranſaction

tranſaction between conjunct and confident perſons is challengeable or reducible at common law, and as falling within the ſpirit and intendment of both the acts 1621 and 1696.

Anſwered for the defender, That her ignorance of her brother's ſituation is as clearly proved as a negative can be; and it is alſo proved, that ſhe had no concern in the diſcounting the bills. The payment made to her is therefore not challengeable at common law, as the *actio Pauliana* was only competent againſt creditors who were *participes fraudis* with the bankrupt; and did not debar lawful creditors from taking payment, even when they knew their debtor to be *lapſus*; *l.* 6. § 6. 8. *et l.* 10. § 16. *ff. Quæ in fraud. cred.*

It is lawful for every creditor to take his payment when he can get it, and the fraud of his debtor cannot hurt him.—— Again, the firſt alternative of the act 1621 only relates to *gratuitous* alienations; and the ſecond to voluntary payments, or conveyances made after diligence is done againſt the debtor. This caſe falls within neither of them, as the defender was an onerous creditor, and no diligence had been done againſt the debtor at the time. Beſides, by the *payments* mentioned in the act, it is thought, are to be underſtood, conveyances of *nomina*, or other ſubjects *in ſolutum*; and not thoſe made in ready money. Nor does the act 1696 extend to this caſe: for although the word *deeds* in it has been found to extend to the delivery of goods, which is a ſpecies of alienation; yet payment in caſh, being a natural extinction of the debt, cannot be recalled. Nor can the debt be revived by the debtor's afterwards becoming a notour bankrupt; 26th *January* 1751, *Forbes contra Burnet*. The annulling ſuch payments would be in effect deſtructive of all commerce.

" The Lords found, the payment made to *Rachel Strachan*, the de-
" fender, does not fall within the act 1696; and therefore aſ-
" ſoilzie the defenders, and decern; but find no expences due."

D. R.

Act. *Burnet.* Alt. *Rae, Ferguſon.*

N° CCXLIV. 5th *Auguſt* 1760.

The TREASURER of ABERDEEN,

AGAINST

Mr JOHN GORDON, and OTHER FEUERS of the lands of *Elſick*.

Objections to the fiars of a county repelled, in a ſuſpenſion of an obligation to pay by ſuch fiars.

THE town of *Aberdeen* having purchaſed the lands of *Elſick* in the county of *Kincardine*, feued out the ſame in parcels, for payment of a duty conſiſting chiefly of meal, to the amount in whole of 188 bolls, to be converted yearly at the rate of the fiars of the county.

The fiars of the county of *Kincardine* for the year 1759, were ſtruck

by an inqueſt, in preſence of the ſheriff, on the 21ſt *February* 1760, and thereby the fiar-price of meal was fixed at *L.* 4, 16 *s. Scots per* boll.

The feuers of *Elſick* preſented a bill of ſuſpenſion of their obligation to pay their feu-duties for that crop, on theſe grounds: 1*mo*, The fiar-price is extravagantly high. The greateſt price given for any farm-meal of that crop, can be proved not to have exceeded *L.* 4, *Whitſunday* payment; and the ſuſpenders are willing to pay at that rate, though it can alſo be proved, that the current price of the beſt meal was only *L.* 3, 10 *s. Scots:* And the end of ſtriking fiars is to aſcertain the current medium price of grain. 2*do*, The ſuſpenders only became bound to pay by the fiars, ſuppoſing them to be ſtruck in a juſt and regular manner: but theſe fiars were not ſtruck according to the act of ſederunt 21ſt *December* 1723; for it does not appear from the extract of the proceedings in ſtriking the fiars, that the jury was ſummoned before the 20th of *February*, or that they were at all cited. 3*tio*, From the ſame extract it appears, that more than the majority of the jury was compoſed of farmers, millers, or maltmen, who might have an intereſt to raiſe the price of the commodity in which they dealt; and it can be proved, that not one of them is a proprietor of land, though the act expreſsly appoints, that the majority ſhall conſiſt of landed men. 4*to*, The jury did not examine a ſingle witneſs concerning the prices of victual: and although the act impowers them to return their verdict, either upon evidence adduced before them, or upon their own proper knowledge; yet it ſpecially appoints, that witneſſes ſhall be adduced: and it muſt be concluded, either that this jury were themſelves extremely ignorant of the matter, or that they wilfully erred. And, *laſtly*, It does not appear that the jury were put upon oath.

Anſwered for the town-treaſurer, charger, 1*mo*, Suppoſing theſe fiars were fixed at too high a rate, which is not admitted, the ſuſpenders are nevertheleſs bound by their contract to take their hazard thereof. The town of *Aberdeen* is not obliged to anſwer for that, or for any irregularities that may have been committed in ſtriking the fiars. If the ſuſpenders think themſelves thereby aggrieved, their proper remedy is by an action of damages againſt the ſheriff and jury, or a proceſs of reduction of the fiars. 2*do*, The neglect of citing the jury before the 20th of *February*, is not inſtructed, and the contrary muſt be preſumed to be true. 3*tio*, Nor is it verified, that the majority were not landed men, though the chargers confeſs, they believe the greater part were only farmers and country-men: but this branch of the act, as to the majority being heritors, is gone into diſuſe, or rather never was in uſe in many counties. 4*to*, The jury having a diſcretionary power, to determine on the evidence of witneſſes, or their own proper knowledge, the charger is not obliged to inquire which method they followed. And, 5*to*, The jury's not being ſworn is not proved; and every thing muſt be preſumed to be *rite et ſolenniter actum.*

Replied, The ſuſpenders only ſeek redreſs ſo far as their own intereſt is affected; and it is certainly competent for the Lords to try their objections in a ſuſpenſion *ad hunc effectum*, without their calling, as defenders in a reduction or proceſs of damages, others with whom the ſuſpenders have no inclination to diſpute for the public intereſt.

"The Lords refuſed the bill of ſuſpenſion." D. R.

For the charger, *Burnett.* Alt. *Rae.*

N°CCXLV.

N° CCXLV. 5th *Auguſt* 1760.

GEORGE BUCHAN of *Kello*,

AGAINST

CHARLES FREEBAIRN architect in *Edinburgh*.

The act 1698, *regulating the manner of buildings within* Edinburgh, *is ſtill in force.*

SOme old houſes upon the high-ſtreet, at the head of *Cant*'s cloſe, in *Edinburgh*, being taken down, a plan for rebuilding them of the height of five ſtories above the ſhops or ground-floor, was authoriſed by the guild-court, after citation of all the conterminous heritors, and no objection made.

After the building was carried to the intended height in the front by *Charles Freebairn* the proprietor, Mr *Buchan* complained, in a bill of ſuſpenſion, of the raiſing the back part of the upmoſt ſtory, as prejudicial to the lights of a houſe belonging to him in *Dickſon*'s land, which ſtands immediately to the weſt of the new building; and he *inſiſted*, That as by act 8. parl. 1698, it is provided, " That all new houſes be " built no higher than five ſtories above the cauſeway," this upmoſt ſtory of the new building being the ſixth from the cauſeway, could not be lawfully erected.

Anſwered for *Charles Freebairn*, 1*mo*, This objection comes too late, as it ought to have been made before the dean of guild granted warrant for rebuilding the houſe, according to the plan, which has been ſince exactly followed out. 2*do*, The practice of the city, authoriſed by warrants of the guild-court, has immemorially explained the act, ſo as to allow five ſtories above the ſhops in the front, and the ſtory immediately above them is always held to be the *firſt* ſtory, and ſo progreſſively. Conſuetude or practice is ſufficient even to abrogate ſtatute-law, and much more to explain it; and it tends more to beautify the city, to allow the raiſing the front or ſide-walls five ſtories above the ſhops, than to have ſuch fifth ſtories made by projections, or *ſtormonts*, as they are called, in the depth of the roof, which is admitted to be ſubject to no prohibition by this ſtatute. And, 3*tio*, According to the words of the act, the computation of five ſtories from the cauſeway ought to be made from the higheſt part of the cauſeway adjacent to the houſe: And, in this caſe, the cauſeway of the cloſe aſcends from the ſtreet; ſo that the ſtory on a level with the ſhops is, in the back part, oppoſite to the ſuſpender's windows, almoſt entirely ſunk below ground; and, conſequently, the top-ſtory in queſtion is in that part only the fifth above the cauſeway, though, computing the ſhops, it is, at the front, the ſixth above the level of the high-ſtreet.

Replied for the ſuſpender, 1*mo*, It is not competent for the dean of guild to authoriſe a plan contrary to the ſtatute; and if he has been miſled to yield to this attempt, it cannot bar this court from confining

the

the building to the legal regulation, eſpecially when the challenge is made before it is finiſhed. 2*do*, The meaning of the ſtatute is clearly expreſſed in computing the five ſtories from the cauſeway, and appointing the thickneſs of the ſide-walls to be proportionally leſſened as they aſcend; ſo that it cannot be doubted, the fifth ſtory, including the ſhops, is the higheſt the law allows to be finiſhed within the ſide-walls. ——Poſitive ſtatutes, enacting rules of an arbitrary nature, may be aboliſhed in *Scotland* (though not in *England*) by diſuſe. But neceſſary rules of public police can never be aboliſhed by diſuſe, or rather by a very bad cuſtom counteracting them; *l.* 39. *ff. De legibus.* But further, inſtances have been diſcovered, where parties have complained of this very abuſe; and the court of ſeſſion has interpoſed its authority to ſupport the law; particularly in 1742, in the caſe of a land oppoſite to the *Luckenbooths*, then rebuilt by Meſſ. *Farquhar*, *Menzies*, and *Baillie*, where the Lords prohibited them from building higher than five ſtories, incluſive of the ſhops or ground-ſtory. And, 3*tio*, It is apparent from the whole tenor of the ſtatute, that the elevation of the houſe is to be computed from the cauſeway of the high-ſtreet.——This is the rule, where cloſes deſcend from the ſtreet; ſo that the buildings in the back parts frequently contain ſeveral ſtories more than in front, which is held to be within the bounds of the law; and there is no reaſon why the ſame rule ſhould not be applied where cloſes happen to aſcend.

" The Lords found the act ſtill in force; and therefore paſſed the " bill."

D. R.

For the ſuſpender, *Ferguſon.* Alt. *Rae.* Reporter, *Kaims.*

N° CCXLVI. 18th *November* 1760.

THOMAS PRINGLE of *Symington*,

AGAINST

JOHN MURRAY tenant in *Fairnyhirſt*.

Action ſuſtained on a bill nineteen years old, the drawer being alive, and making oath, that the contents were ſtill owing.

William Murray, the defender's father, poſſeſſed a farm belonging to *Pringle* of *Symington*, the purſuer's father.

On the 13th *December* 1732, *William* accepted a bill drawn upon him by and holograph of the purſuer, for ten guineas, payable againſt the 15th *November* 1733.

The purſuer's father died in 1738; after which *William*, the accepter of the bill, poſſeſſed under the purſuer until his death in 1744.

The defender ſucceeded to his farm and effects; and ſoon after, there was a clearance between the purſuer and him, with reſpect to his father's poſſeſſion, and a diſcharge granted for all bygone rents. He continued to pay his rent as it fell due; but neither at the time of clearance, nor for ten years afterwards, was there any mention made of the above bill.

In 1753, Mr *Pringle* purſued *Murray* for payment of this bill; and obtained

obtained decreet in abſence for the contents of it, after deducing *L.* 5 marked paid thereon.

In a ſuſpenſion of this decree, it was *pleaded* for *Murray*, 1*mo*, That all action on this bill was loſt by the purſuer's taciturnity, it having lain over from the year 1732 to 1753: That this doctrine, founded upon the very nature of bills, was eſtabliſhed by all our lawyers; *Stair*, *b.* 4. *tit.* 32. § 6.; *Bankton*, *b.* 1. *t.* 13. § 31.; and their opinions confirmed by a variety of deciſions; *Wallace* againſt *Lees*, 31ſt *January* 1749; *Moncrieff* againſt *Moncrieff*, 13th *December* 1751; *Lookup* againſt *Crumbie*, 20th *February* 1754; and ſeveral others.

2*do*, That the frequent tranſactions between the parties during all that time, without any mention of the bill, confirmed the ſuſpicion againſt this debt, and the legal preſumption of payment or extinction.

3*tio*, That theſe objections were not removed by the receipt of a partial payment wrote on the back of the bill. For if ſuch a jotting on the back of a bill, was to hinder it from being cut off by the taciturnity of the drawer, a pretended creditor, who had either forged a deed, or poſſeſſed himſelf of a ground of debt already paid, might preſerve it in force, after all opportunity of detection was loſt, by writing on it receipts of partial payments.

4*to*, Neither could the bill be ſupported by the drawer's oath in ſupplement. It would even be an extraordinary indulgence, to refer it to the oath of the *accepter*'s repreſentative. Sir *George Mackenzie* obſerves, on the act 1669, " That holograph writs and ſubſcriptions, " without witneſſes, not purſued within twenty years, are only to be " proven by the oath of the ſubſcribers; ſo that if the ſubſcriber dies, " theſe writs die with him." Therefore, as in the caſe of a holograph bond, the debt cannot be proved, after twenty years, by the oath of knowledge of the granter's repreſentative; far leſs ought ſuch oath to be put to the repreſentative of the granter of an old bill; as bonds are intended for permanent ſecurities; which, it is certain, bills are not.

Anſwered for the charger, 1*mo*, With regard to taciturnity, in this caſe the bill did not lie over for twenty years, which is the ſhorteſt time that has ever been found to cut down a bill on that head. The bill was payable 15th *December* 1733, and the ſummons for payment of it was executed on 26th *April* 1753, which is little more than nineteen years. The preſent caſe, therefore, does not at all quadrate with the deciſions referred to by the purſuer; for in all of them the taciturnity continued above twenty years.

2*do*, The tranſactions between the parties can never be conſtrued into an extinction of the debt. The money was lent out of favour to the defender; and the ſame cauſe occaſioned the delay of ſeeking payment.

3*tio*, It is not neceſſary to plead the partial payment marked on the back of the bill as an interruption: for though no receipt had been there, the bill itſelf was not preſcribed. Nor does the opinion of Sir *George Mackenzie* on the act 1669 apply to the preſent caſe: For, 1*mo*, There is no law by which bills preſcribe, like holograph writings, in twenty years. 2*do*, This bill was made a ground of action within that time.

" The Lords ſuſtained action on the bill, the purſuer making oath,

" That the contents of the ſaid bill, drawn by himſelf, were " ſtill reſting owing, ſo far as by him claimed in this proceſs."

I. C.

Act. *G. Pringle.* Alt. *Rae.*

N° CCXLVII. 18th *November* 1760.

MARJORY STEVEN, relict of *William Johnſton* maltſter in *Aberdeen*,

AGAINST

JOHN ROBERTSON merchant there.

No action of damages found to lie againſt the ſeller of victual for non-implement, where the price was referred to the ſeller, and the buyer himſelf having died before the whole was delivered, his repreſentatives made a demand for the remainder, but without offering ready money, or caution for the price.

IN *November* 1756, *William Johnſton* maltſter in *Aberdeen*, and Provoſt *Robertſon*, entered into a verbal agreement; whereby the provoſt ſold his farm-bear of *Pitmillan*, for crop 1756, to *Johnſton*, deliverable as ſoon as the ſame could be got ready by the tenants, the price to be fixed by the ſeller.

In purſuance of this agreement, thirty bolls were delivered before *Chriſtmas*; but *Johnſton* dying ſoon after, the provoſt ſold the remainder of his bear to others, at *L.* 10 *Scots per* boll, the ſame price charged for the thirty bolls that were delivered; having previouſly let *Johnſton*'s widow know, who made a demand for the remainder, that he would deliver her none, as he knew nothing of her circumſtances.

Some months after, an action of damages was brought by the widow againſt *Robertſon*, upon this medium, That he had taken only *L.* 10 *Scots* for the bear delivered, and ſhe had been obliged to pay *L.* 12 ſoon thereafter for what bear ſhe wanted. and decreet was pronounced in her favour.

Pleaded for *Robertſon*, in a ſuſpenſion of this decree, 1*mo*, That in point of intereſt he could have no temptation to reſile, as it was impoſſible for him to get better terms; and the purſuer could have as little reaſon for inſiſting on implement, as ſhe might at that time have purchaſed any quantity of bear ſhe choſe at *L.* 10 *Scots per* boll. The defender informed her why he declined the delivery of the remainder of the barley; and ſhe tacitly acquieſced, having never made further requiſition. She got that notice immediately upon her huſband's death, which was before *Chriſtmas*. The bear continued from that time till *March* to be ſold currently at *L.* 10 *Scots per* boll. She had therefore three months to provide herſelf, at the ſame price fixed by the defender for the bear formerly delivered; and if, by her own delay, ſhe was obliged to pay a higher price, no claim could from thence

ariſe

ariſe againſt the defender; *l.* 21. § 3. *ff. De act. empt. vend.*; *Hotoman. Diſp. p.* 728.

2*do*, There was no ſtipulation as to the quantity to be delivered; no penalty for failure; the price, the time of delivery, and term of payment, were all left *in arbitrio* of the ſeller. Had *Johnſton* lived, the ſeller would have been intitled to have demanded ready money; and, if refuſed, to have ſold his victual to whom he pleaſed. His anſwer to the purſuer plainly imported ſuch a demand, or at leaſt a demand for good ſecurity; but as ſhe offered neither, and did not even make any further requiſition, in common ſenſe he was no longer bound.

3*tio*, Although an action for damages may be well founded, when a certain price is ſtipulated, and the ſeller refuſes delivery for the ſake of a higher price; yet when the price is referred to the ſeller himſelf, there can be no ſuch motive for his failure in delivery. Neither can damage be any conſequence of that failure. By the Civil law, where the price is referred either to the ſeller or to the buyer, there can be no claim of damages againſt the ſeller for failure to deliver, or againſt the buyer for refuſal to receive; *l.* 13. *C. De contr. empt.*

Laſtly, By the terms of the agreement, the defender was certainly intitled to demand the higheſt price given for barley that year, which was *L.* 12. It is inconſiſtent, therefore, to plead, that his charging only *L.* 10 for what he had delivered, ſhould be the foundation of an action of damages againſt him.

Anſwered for *Marjory Steven*, The defender's arguments reſolve into an objection, 1*mo*, To the validity of the contract; 2*do*, To the aſcertaining damages through breach of it.

With reſpect to the *firſt*, It is in vain to have recourſe to the Civil law to prove its nullity; for whatever may have been the opinion of the Civilians, it is certain, that ſuch contract is binding by the law of *Scotland*. In this caſe, there was a complete bargain for the whole farm-bear, deliverable ſo ſoon as it could be got ready. Part of it was delivered; and conſequently, as matters were no longer entire, there could be no *locus pœnitentiæ* to the ſeller on the death of the buyer. The only thing left to him was, to aſcertain the price; and he could not arbitrarily uſe that power, either to avoid the contract, or commit extortion; if he had attempted either, a court of juſtice would have given redreſs.

2*do*, Neither is the defender's alledgeance, That in point of intereſt he had no temptation to reſile, a good defence. The law does not ſo much conſider the benefit ariſing to the perſon who reſiles, as the damage done to the other party by the breach of a mutual contract. And as to the purſuer's acquieſcence in the not delivery, the contrary is manifeſt: for it is admitted, that ſhe made a demand for delivery, and was refuſed. Beſides, although ſhe had made no requiſition, it was incumbent on the defender to have made an offer of the grain, on her paying, or finding ſufficient ſecurity for the price: but he does not pretend, that he made any ſuch offer; and therefore he ought to be liable for any damage ſhe has ſuſtained by the bargain.

Nor is it a good objection, That the purſuer might, ſome time after her huſband's death, have bought bear at *L.* 10 *per* boll. She had then a conſiderable quantity on hand; and it is not pretended, that ſhe could foreſee the riſe of the price that happened ſo ſoon after. Neither

ther do the authorities from the Civil law conclude againſt her, as they do not fix the preciſe length of time ſufficient to bar ſuch an action. And as to what is urged for the defender, That he might have charged the higheſt price of the ſeaſon for his barley, and conſequently there could be no loſs incurred through the not delivery; that argument is fallacious. When a contract is entered into, the terms of which are indefinite, theſe terms muſt be ſettled upon equitable principles. In this caſe, as the current rate of the country was not known at the time of the bargain, the period for aſcertaining the price was very properly deferred to that of delivery. Part of the barley was delivered, and the remainder in readineſs for delivery, before the end of *December*. At that time, it is agreed, the current price was *L.* 10 *Scots*, and in equity no more could have been demanded by the defender; and therefore he ought to pay the difference between the price at that time, and what the purſuer was afterwards obliged to pay.

"The Lords found no damages due." I. C.

Act. *Rae.* Alt. *Garden.*

N° CCXLVIII. 18th *November* 1760.

DAVID CUNINGHAM BAKER in *Edinburgh*,

AGAINST

George Home, late Deacon, and *Charles Cuningham*, Boxmaſter, of the INCORPORATION OF BAKERS there, *David Simſon*, agent, *James Fraſer* and *James Dougal*, and others, ſervants to the members of the Incorporation, in the management of their mills.

Arreſtment of grain belonging to one of the members of a corporation, uſed againſt the managers and ſervants of that corporation, the grain being in their hands for the purpoſe of being grinded, found not competent.

THE bakers of *Edinburgh* were formerly thirled to the mills belonging to that city, for all wheat grinded by them; but finding that ſervitude inconvenient, they, for payment of an agreed feu-duty, got an irredeemable right to theſe mills, in favour of their then deacon and boxmaſter, and their ſucceſſors in office, for the uſe and behoof of the incorporation of bakers, and their ſucceſſors.

By the regulations eſtabliſhed for the management of theſe mills, it appeared, that the benefit of the feu was intended ſolely for the utility of the reſpective members, and not to have any connection with the corporation-funds; and that that benefit was communicated to the widows of ſuch members as carried on trade after their huſband's death.

A widow of one of the members of the corporation, having brought ſome wheat to the mill to be grinded, *David Cuningham*, her creditor, arreſted it, while it was grinding, in the hands of the deacon and boxmaſter,

boxmaſter, clerk, and other ſervants of the corporation; and afterwards inſiſted againſt them in an action of forthcoming.

The deacon and boxmaſter *pleaded*, That, as managers of the corporation-funds, they could not be found liable; becauſe the corporation neither had intereſt in nor poſſeſſion of theſe mills. The feu was not granted to the corporation as an *univerſitas*, but to the particular members, who were the proprietors, and as ſuch were both in the civil and natural poſſeſſion of the mills. Nor could the feu's being taken in the name of the corporation ſubject the managers in this action; for it was only a name uſed for the behoof of the particular members. They had no concern in the management of the mills, further than as individuals of the corporation; conſequently, in the preſent queſtion, they fall to be conſidered only in that capacity.

In the *next* place, With regard to the arreſtment uſed in the hands of the ſervants, it was certainly inept: for it was an eſtabliſhed point, That an arreſtment could not be uſed in the hands of the ſervant of a debtor, for the purpoſe of obliging that ſervant to make the goods forthcoming; as the ſervant's poſſeſſion is underſtood to be the maſter's poſſeſſion; and there can be no arreſtment in the hands of the debtor himſelf. By the regulations for the management of theſe mills, the ſervants are the proper ſervants of the individual member whoſe grain for the time is under their care. They take their directions from and are paid by him; and therefore, in every reſpect, are to be looked on as his ſervants.

Laſtly, The arreſtment in the clerk's hands can be of no avail. For he is not cuſtodier of the grain: his ſole buſineſs is, to keep an account of the grain grinded for the reſpective members, ſo as to aſcertain how much each is ſeverally bound to pay.

Anſwered for the arreſter, He is well founded in his action of forthcoming againſt the deacon and boxmaſter; becauſe they, as the legal repreſentatives of the corporation, are undoubtedly the proprietors and poſſeſſors of the mill: the feu-right is taken in their names; and arreſtment in their hands is held in law as arreſtment in the hands of the corporation. If any perſon, not a member of the corporation, had been allowed to grind wheat at theſe mills for his own uſe, and his creditor had inclined to arreſt it, he would have exactly taken the ſame method, and it would have been effectual: and ſo it ought to be in the preſent caſe; for it can make no difference, that the proprietor of the wheat was in ſo far conſidered as a member of the corporation to whom the mills belong, as to have the privilege of grinding there; as the wheat was allowed to be her ſeparate property; and it is undoubted law, That if a member of a copartnery lodges goods, which are his own property, in the hands of the copartnery, theſe may be arreſted in the company's hands, although he is himſelf a member of that company.

The arreſtment in the hands of the ſervants was alſo an effectual arreſtment; becauſe, both in common ſenſe and law, a ſervant has ſuch a poſſeſſion as the law requires to found an arreſtment: which doctrine is confirmed by a deciſion abridged in the *Dictionary*, *voce Arreſtment*, where an arreſtment laid on in the hands of a wife, acting for her huſband, was found effectual to oblige her to

make good what was in her hands at the time of the arreſtment; *Fountainhall*, 18th *July* 1706, *Hume contra Pringle*.

Laſtly, Suppoſing arreſtment in the hands of a ſervant were incompetent, the millers, in the preſent caſe, cannot, with any propriety, be conſidered as the ſervants of each particular member, during his turn, although, to avoid confuſion, they are paid a certain quantity out of each parcel grinded: for they are hired by the corporation annually; the care of the mill is committed to them by the deacon and box-maſter, in name of the corporation; and upon any emergency they are intitled to give orders to the ſervants of the mill, not to grind for any particular member, preferable to the orders of the member whoſe turn it is to grind.

" The Lords found the arreſtment not competent." I. C.

Act. *Johnſtone*. Alt. *Montgomery*.

N° CCXLIX. 26th *November* 1760.

JAMES Duke of ATHOLE,

AGAINST

His MAJESTY's ADVOCATE.

Queſtion on the clan-act.

BY an act in the 1ſt of *George* I. it was provided, " That if any ſub-
" ject of *Great Britain*, holding lands of a ſubject-ſuperior in *Scot-*
" *land*, ſhall be guilty of the treaſons therein mentioned, and *ſhall be*
" *thereof duly convicted and attainted*, his lands or tenements, held of
" any ſubject-ſuperior in *Scotland*, ſhall recognoſce and return into the
" hands of the ſuperior, and the property ſhall be conſolidated with
" the ſuperiority, in the ſame manner as if the ſame lands had been
" by the vaſſal reſigned into the hands of the ſuperior *ad perpetuam re-*
" *manentiam*."

The Duke of *Athole* was ſuperior of the lands of *Tomknoc* and *Cultranick*, belonging in property to *James Drummond*, commonly called *Duke of Perth*, who was engaged in the rebellion 1745; as was alſo his brother, and preſumptive heir, *John Drummond*.

An act of attainder was paſſed againſt the ſaid *James* and *John Drummonds*, and other rebellious ſubjects; whereby it was enacted, " That if they did not ſurrender themſelves to one of his Majeſty's " juſtices of peace, on or before the 12th day of *July* 1746, they " ſhould, from and after the 18th *April* 1746, ſtand and be adjudged " attainted of high treaſon."

James Drummond, the elder brother, died upon the 11th *May* 1746, before the time limited for ſurrendering himſelf. *John* ſurvived; but never ſurrendered himſelf.

The eſtate of *Perth*, comprehending the lands above mentioned, was firſt ſurveyed as belonging to *James Drummond*, by whoſe attainder they were ſuppoſed to be forfeited; but the court of ſeſſion having thereafter

thereafter found, that his eſtate did not become forfeited to his Majeſty in and through the attainder of *James Drummond*, in reſpect that he died within the time limited for the ſurrender, (*See Falconer*, *v.* 2. N° 87.), it was again ſurveyed as having become forfeited by the attainder of *John Drummond*.

The Duke of *Athole*, ſuperior of the above lands, entered his claim to the property of them, in terms of the clan-act; and it appearing to be a matter of doubt, whether they became forfeited by the attainder of *James* or *John*, he claimed them in both ways, as forfeited by the attainder either of *James Drummond*, or of his brother *John*. It was likewiſe a matter of doubt, whether the clan-act extended to forfeitures upon occaſion of the rebellion 1745. This queſtion had been tried upon a claim of the Duke of *Gordon*; but never brought to a final iſſue, becauſe of a compromiſe which was agreed to between the crown and the ſubject-ſuperiors. The Duke of *Athole*, in order to intitle him to the benefit of this compromiſe, found it neceſſary to inſiſt in his claim; which was objected to upon the following grounds.

Pleaded for the crown, *James Drummond*, commonly called *Duke of Perth*, was indeed vaſſal to the claimant in the lands now claimed, during the whole period of the late rebellion, and for ſome time after; but as he never was attainted, but died a liege-ſubject, his lands cannot fall to the ſuperior in virtue of the clan-act. The claimant cannot ſubſume in terms of the ſtatute, "That *James Drummond* of *Perth*, "being his vaſſal in the lands now claimed, was guilty of the treaſons mentioned in the ſtatute, *and was thereof duly convicted and attainted*." For in fact he never was convicted or attainted of any treaſon; and conſequently the claim is not founded. In the *next* place, With regard to *John Drummond*, it is impoſſible for the claimant to maintain, "That *John Drummond*, holding lands of the claimant as "his ſuperior, was guilty of treaſon, and thereof duly convicted and "attainted." He was indeed guilty of treaſon, and thereof duly convicted and attainted; but he held no lands of the claimant during the continuance of the treaſon, or prior to the attainder. He declined ſurrendering himſelf; and therefore, by the expreſs words of the act of attainder, became attainted from the 18th of *April* 1746; at which time his brother was alive, and vaſſal to the claimant; conſequently *John Drummond* was not vaſſal to the claimant at or before his attainder. The ſucceſſion devolved upon him afterwards; and became thereby forfeited to the crown.

Anſwered for the claimant, This eſtate certainly belonged either to *James Drummond*, or to *John*, both of whom were in the rebellion, and named in the act of attainder; and it would be hard to deprive the claimant of the benefit of their forfeiture, becauſe *James* happened to die before the day appointed for his ſurrendering himſelf, and becauſe *John* did not think proper to ſurrender himſelf. Beſides, the claimant cannot agree to the poſition, That *John Drummond*'s attainder took place upon the 18th *April*; for it will be remembered, that *Thomas Drummond* of *Logiealmond* entered a claim to the property of the eſtate of *Perth*, upon this very footing, That the eſtate was not forfeited through the attainder of *John Drummond*, in regard his blood was attainted upon the 18th of *April* 1746, he not having ſurrendered himſelf to juſtice before the 12th of *July* following. But the court of ſeſ-

ſion,

ſion, upon the 1ſt *December* 1750, found, "That *John Drummond*, ſe-"cond ſon to the late Lord *Drummond*, now attainted of high treaſon, "was, upon the 11th *May* 1746, when *James Drummond*, his elder "brother, died, capable to take by deſcent from his ſaid elder brother; "and that the eſtate in queſtion did then deſcend, by *James*'s death, "to *John Drummond*, now attainted; and was forfeitable, and forfeit-"ed, by the treaſon and attainder of the ſaid *John Drummond*;" (*Falconer*, *v.* 2. N° 169.); and this judgment was affirmed in the Houſe of Peers. So that it cannot be maintained, that the attainder of *John Drummond* took effect ſooner than the 12th of *July* 1746.

Some of the judges were of opinion, that the forfeiture was incurred *after John Drummond*'s ſucceſſion: yet they thought the objection good, as the ſuperior had no hold of the vaſſal during the rebellion.

"The Lords diſmiſſed the claim." I. C.

Act. *D. Græme, Lockhart.* Alt. *Crown lawyers.*

N. B. There were ſome other objections made to the claim; but the above was the only material one.

N° CCL. 26th *November* 1760.

The Principal and Maſters of the United Colleges of *St Salvator* and *St Leonard*, in the UNIVERSITY of St ANDREW's,

AGAINST

Mr JAMES MONTGOMERY, Advocate.

Inhibition of teinds, executed by a party neither in poſſeſſion as titular, nor having brought any proceſs for aſcertaining his right, is inept.

THE principal and maſters of the college of *St Leonard*, and afterwards of the united colleges of *St Salvator* and *St Leonard*, in the univerſity of *St Andrew's*, were ſuppoſed to be patrons of certain pariſhes in the ſheriffdom of *Aberdeen*; and were in uſe to ſet leaſes of the tithes, receive the rents thereof, and diſpoſe of the vacant ſtipends of theſe pariſhes, from the year 1663 downwards.

The title, however, upon which this poſſeſſion was founded, having lately been called in queſtion by the officers of the crown; and it appearing to be a matter of doubt, whether the right to theſe teinds did truly belong to the college, or to the King, as in right of the dean and chapter of the archbiſhoprick of *St Andrew's*; the matter was laid before the Lords of the Treaſury; and, in the mean time, Mr *James Montgomery*, his Majeſty's ſolicitor for the tithes, in order to prevent tacit relocation, and interpel the uſe of payment to the college, raiſed and executed, at the ſeveral churches of the ſaid pariſhes, an inhibition of teinds, at the inſtance of the crown, againſt the heritors.

The principal and maſters of the college complained of this to the court of ſeſſion; and prayed, That the inhibition might be recalled; reſerving

ſerving to the officers of the crown to proſecute the crown's right, as they ſhould be adviſed.

Pleaded for the college, Inhibition of teinds can only be uſed by a proprietor, or one who has a proper title to enter into poſſeſſion. The crown can have no ſuch title in the preſent caſe, without firſt prevailing in a declarator of right; which, however, is not yet brought. And the complainers have been in the lawful poſſeſſion of theſe teinds for near a century; which is much more than ſufficient to found them in a poſſeſſory judgment.

Anſwered for Mr *Montgomery*, The college can have no legal plea to be continued in a poſſeſſion which has been altogether precarious, and ſuffered by neglect of the crown's officers. The benefit of a poſſeſſory judgment muſt be founded on a proper title; of which there is no veſtige in this caſe. It was the reſpondent's duty to ſtop the uſe of payment which had been made to the college without any juſt title; and the proper way of doing this was by executing an inhibition; *Stair*, *b.* 2. *tit.* 8. § 23. *b.* 4. *tit.* 24. § 2.; *Erſkine*, *b.* 2. *tit.* 10. § 21.

" The Lords recalled the inhibition." I. C.

Act. *J. Craigie.* Alt. *Montgomery, Garden.*

N° CCLI. 27th *November* 1760.

CHILDREN of DAVID LIZARS,

AGAINST

The REPRESENTATIVES of JOHN DICKIE writer to the ſignet.

Factor loco tutoris *liable for omiſſions.*

John Dickie writer to the ſignet was, in 1744, appointed factor *loco tutoris* by the court of ſeſſion, for managing the eſtate and effects of the children of *David Lizars*, who had died ſome time before, without naming tutors to them.

Among the debts due to Mr *Lizars*, was a bond granted to him, in *January* 1743, by *Archibald Punton*, *Thomas Hay*, and *George Begbie*, jointly and ſeverally, for the ſum of 2000 merks.

Mr *Dickie* continued to have the management of the childrens affairs till the 1754, when he died; and the children ſoon after brought a proceſs againſt his repreſentatives, to account for his intromiſſions with their eſtate. The defenders, in the account exhibited by them of Mr *Dickie*'s intromiſſions, took credit for the aforeſaid bond of 2000 merks, and annualrents due thereon; the whole three obligants having become bankrupt, and no part, either of principal or intereſt, having ever been paid.

Upon inquiring into the fact, it appeared, that all the three debtors in the bond had continued in good credit till the 1747; that *Hay* had failed about the end of that year, and *Punton* ſome time in 1748;

that *Begbie* continued ſolvent till the 1754; and that during all this time Mr *Dickie* had taken no ſtep, either to recover payment of the money, or get additional ſecurity from *Begbie*, upon the failure of the other two.

The purſuers, therefore, *objected* to this article in the account; and *inſiſted*, That the defenders, as repreſenting Mr *Dickie*, were bound to make up this loſs to them, which had happened through his ſupine negligence. Mr *Dickie*, by the nature of his office, and by the regulations laid down in the act of ſederunt 1730, was bound to do exact diligence; and to take care, not only that the annualrents were punctually paid, but that the principal was properly ſecured. It was a moſt groſs neglect in him, to allow the money to remain upon the ſecurity of *Begbie* alone, for ſo long a time after the bankruptcy of the other two obligants; more eſpecially, as *Begbie*, though he had ſome little credit in the way of trade, was never known to be poſſeſſed of any ſolid or ſubſtantial fund. Mr *Dickie* ought not to have allowed the money to remain upon a worſe ſecurity than that on which it was originally lent; and leaſt of all ought he to have ſuffered it to lie in *Begbie*'s hands, without ever receiving a penny of annualrent.

Anſwered for the defenders, After the bankruptcy of *Punton* and *Hay*, *Begbie* continued in good circumſtances, and was not in the leaſt ſuſpected by any perſon till the 1754, when he gave way all of a ſudden. The firſt intimation of his failure was given by himſelf, at a meeting of his creditors called for that purpoſe. The creditors agreed to take joint meaſures: His effects were veſted in a truſtee for behoof of all concerned; a dividend has already been made; and the ſhare which the purſuers are intitled to, and which will be paid when called for, amounts to *L.* 69 *Sterling*: ſo that they will only loſe an inconſiderable balance. Mr *Dickie* was guilty of no improper neglect, in allowing the money to remain in *Begbie*'s hands; becauſe his circumſtances were reputed to be good. He acted with the ſame degree of diligence that he would have uſed in his own affairs; and therefore the defenders cannot be liable.

"The Lords found the defenders liable to account for the debt."

I. C.

Act. *Montgomery*. Alt. *Macqueen*. Clerk, *Home*.

N° CCLII. 2d *December* 1760.

BARBERS of EDINBURGH,

AGAINST

BARBERS of CANONGATE.

Tradeſmen reſiding in a borough of regality or barony adjacent to a royal borough, cannot be ſubjected to the authority of an incorporation of ſimilar tradeſmen reſiding within the royal borough.

IN the year 1505, the ſurgeons and barbers of *Edinburgh* were, by an act of the town-council, erected into an incorporation, with ſundry privileges, which they have ever ſince enjoyed.

The

The ſuperiority of the borough of regality of the *Canongate* was acquired by the city of *Edinburgh* in the year 1639, at which time there was in the *Canongate* no eſtabliſhed corporation of ſurgeons and barbers.

In *April* 1649, the magiſtrates and town-council of *Edinburgh* paſſed an act, "requiring the bailies of the *Canongate* to concur with the "deacon and the ſurgeons and barbers of *Edinburgh*, in taking order "with the unfreemen ſurgeons and barbers within their ſeveral bounds "reſpectively; and that none exerciſe the ſaid craft, nor put out ſigns "or baſons, until they obtain liberty from the deacon and freemen of "the ſurgeons and barbers of *Edinburgh*, and be ſubject to their or-"der and injunctions."

The bailies and council of the *Canongate*, upon the 2d of *Auguſt* 1649, paſſed an act, "ordaining fourteen perſons therein named, un-"freemen, barbers within the borough, to take in their ſigns and "baſons, and exerciſe no part of ſurgery or barber craft within the "borough, or privileges thereof, in time coming, till they obtain li-"berty, and be ſubject to the orders and injunctions of the deacon "and freemen of the ſurgeons and barbers of *Edinburgh*. And fur-"ther ordained, That the apprentices of all ſuch as enter, and give "ſatisfaction to the deacon and trade of the borough of *Edinburgh*, "and their ſucceſſors, ſhall pay no more for their burgeſsſhip than "other apprentices have paid within the borough."

By theſe acts the ſurgeons and barbers of *Canongate* were put under a dependence and ſubjection to the ſurgeons and barbers of *Edinburgh*. The regulation was acquieſced in by all the parties, and was ratified in parliament in the year 1670.

Excerpts from the books of the incorporation of ſurgeons and barbers of *Edinburgh* were alſo produced from the year 1649 downwards; by which it appeared, that perſons had been from time to time regularly admitted by the ſurgeons and barbers of *Edinburgh*, to exerciſe that trade in the *Canongate*; and that they had regularly paid their upſets and quarter-dues, and entered their apprentices in the books of the incorporation in *Edinburgh*; and when theſe apprentices had ſerved their time, they were regularly admitted to be free barbers, with liberty to exerciſe their trade within the bounds of the *Canongate* only.

In the year 1718, a proceſs of declarator was brought by the barbers of *Edinburgh* againſt the ſurgeons of *Edinburgh*, in which a decree was pronounced in the 1722. By that decree the two incorporations were, in ſome reſpect, ſeparated from each other; and the right of the barbers of *Edinburgh* over the barbers of the *Canongate* was referred to, in the proceedings and in the interlocutors of the court, as undiſputed; and regulations were eſtabliſhed with reſpect to the method, and the dues, of admitting the barbers of the *Canongate*.

After this decree, the barbers of *Canongate*, in *September* 1722, entered into a contract with the barbers of *Edinburgh*, in which that decree, and an act of the town-council which had followed upon it, were recited. By that contract, the barbers of *Edinburgh* gave certain abatements to the barbers of *Canongate*; and reſtricted, in many reſpects, the power they had exerciſed over them, as eſtabliſhed near a century before, reſerving only to the barbers of *Edinburgh* the one half of their upſets. This contract was ſigned by all the barbers then reſiding in the *Canongate*, and by their ſucceſſors, till the year 1742, when ſome of the barbers

barbers of the *Canongate* refuſed to acquieſce in it. Upon this the barbers of *Edinburgh* brought a proceſs of declarator for aſcertaining their right.

Pleaded for the barbers of *Canongate*, That the magiſtrates and town-council of *Edinburgh*, notwithſtanding the purchaſe of the ſuperiority of the borough of the *Canongate*, had no power to reſtrain the inhabitants of *Canongate* from exerciſing any lawful trade or occupation. Their acts of council in the year 1649 were made without any authority, and were ſo many oppreſſive acts of power exerciſed by ſuperiors over their vaſſals; and being founded on wrong, they could not be confirmed by any length of time, nor by the acquieſcence of the inhabitants of the vaſſal-borough. The ratification in parliament, which paſſed of courſe *periculo petentium*, can have no effect: and the contract entered into in the 1722, was an impoſition upon the part of the barbers of *Edinburgh*, who thereby pretended to eſtabliſh a dependent ſociety within the borough of the *Canongate*, and to communicate to them rights and privileges which they could not give, and which the freemen of the borough were intitled to exerciſe in their own right. And ſuppoſing that contract could bind the particular perſons who entered into it, yet it could not be obligatory upon other perſons who happened thereafter to exerciſe the ſame trade within the *Canongate*.

Anſwered, The conſtant poſſeſſion and acquieſcence of all parties during a century, muſt have the effect to bar after challenges and inquiries into the origin of the poſſeſſion, and the powers of thoſe who firſt authoriſed it. Beſides, the regulation made in 1649, was in itſelf reaſonable and proper. It was alſo founded in law; for the barbers of *Canongate* were reſtrained from exerciſing their craft in that part of the ſuburbs of *Edinburgh*, by act 156. parl. 1592, by which it was declared, "That in all time coming, there ſhould be no exerciſe of crafts in "the ſuburbs adjacent to boroughs, but that the ſame ſhould ceaſe in "all time thereafter."

And though by a deciſion, 21ſt *July* 1669, town of *Perth*, this act was found not to extend to tradeſmen living within the neigbourhood of a royal borough, but under the juriſdiction of a third party; yet this limitation could not apply to the inhabitants of the *Canongate* in the year 1649, after the town of *Edinburgh* became ſuperiors of that borough; and unleſs ſuburbs of this kind are underſtood to have been meant by the act 1592, that ſtatute can have no meaning at all; ſince there was no occaſion for a ſtatute with reſpect to ſuburbs, which were ſituated within the bounds and liberties of a royal borough; becauſe as to theſe. the very conſtitution of incorporations gave them an excluſive privilege.

"The Lords found, That the barbers of the borough and regality "of the *Canongate* were not ſubject to the incorporation of barbers "of the city of *Edinburgh*, or liable in payment to them of any "ſums of money; and therefore aſſoilzied."

Act. *Johnſtone, Ferguſon.* Alt. *Lockhart.*

Thereafter the ſociety of barbers of the *Canongate* inſiſted in a proceſs for having it found and declared, That the barbers of *Edinburgh* were not an incorporation, having excluſive privileges of exerciſing their employment within the city; and that they, the purſuers, had good right

right and title to ſhave beards, clip, trim, and dreſs hair within the city of *Edinburgh*, and liberties thereof. The deciſion of this queſtion depended on the import of a variety of writings, acts of council, and ſeals of cauſe, which it is of no importance to ſtate.

" The Lords aſſoilzied; and found the defenders intitled to their ex-
" pences." I. C.

Act. *Rae.* Alt. *Johnſtone.* Clerk, *Pringle.*

N° CCLIII. 4th *December* 1760.

AGNES STEWART of *Phiſgil*, and JOHN HAWTHORN, her huſband,

AGAINST

The CHILDREN and CREDITORS of Captain JOHN STEWART, alias COLTRAIN, of *Drummorel.*

Though a liferent granted to a wife by her husband, on lands ſettled on him by his grandfather's entail, to which his title was afterwards reduced on his grandfather's contract of marriage, was ſuſtained as an onerous right derived from one who was habilely veſted in the property, without any incumbrance appearing on record; yet the heir prevailing in the reduction was found intitled to relief againſt the husband's proper eſtate, for that part of the liferent which was originally ſecured upon it, before he ſucceeded to his grandfather's eſtate.

John Stewart of *Phiſgil*, in 1668, ſettled his eſtate in his contract of marriage to the *heirs* of the marriage; and his eldeſt ſon having died without iſſue, the purſuer, *Agnes Stewart*, only child of *Robert*, the ſecond ſon, who alſo predeceaſed his father, became the heir of the marriage, intitled to take the eſtate, upon her grandfather's death, under the ſaid contract.

John Stewart, however, in 1719, executed a deed of ſettlement in the form of a ſtrict entail, whereby he diſinherited his grand-daughter *Agnes*, and provided his eſtate of *Phiſgil* to his own ſurviving ſons and daughters *ſeriatim*, and their iſſue.

John Stewart ſoon after died; and was ſucceeded, in virtue of this entail, by *William*, his third ſon; who having likewiſe ſoon after died without iſſue, was ſucceeded by his eldeſt ſiſter: and ſhe poſſeſſed the eſtate till her death, in the year 1742.

During the poſſeſſion of this eldeſt daughter of *John Stewart*, *John Coltrain* of *Drummorel*, eldeſt ſon of the ſecond daughter of *John Stewart*, and next preſumptive heir in the entail to his aunt, who never was married, entered into a marriage-contract with Mrs *Chriſtian Herron*, whereby, in conſideration of 9000 merks of tocher, he became bound to infeft her in an annuity of 600 merks, to be uplifted out of his lands of *Drummorel:* And it was further provided, That in caſe he ſhould at any time during the marriage ſucceed to the eſtate of *Phiſgil*, as heir of tailzie to his aunt, the lands of *Drummorel* ſhould be diſburdened of the above annuity, and he ſhould be obliged to infeft his ſpouſe in an annuity of 900 merks, payable out of the eſtate of

Phiſgil, in caſe of children of the marriage, and 1200 merks in the event of no children.

Upon his aunt's deceaſe, *John Coltrain* obtained himſelf ſerved heir in the eſtate of *Phiſgil*, in terms of the tailzie; and having completed his titles by infeftment, he, in 1734, granted a bond of proviſion, upon the recital of his marriage-contract, and of the tailzie of *Phiſgil*, whereby the heirs were allowed to provide their wives in competent liferents, not exceeding one fourth of the free rent; and that he was reſolved to provide his ſpouſe in an additional jointure out of his lands of *Drummorel*, over and above her liferent of the fourth part of the free rent of *Phiſgil*, his intention being, that ſhe ſhould have a yearly liferent of 1200 merks, in caſe of children, and 1500 merks in caſe of none; therefore he provides her to the fourth part of the free rent of *Phiſgil*; and further obliges himſelf, to infeft her in a yearly liferent of 500 merks, upliftable out of *Drummorel*, at leaſt ſo much thereof as, with the fourth of the rent of *Phiſgil*, might completely make up the liferent-proviſion to the amount aforeſaid, of 1200 or 1500 merks.

Upon this bond infeftment followed, both in the lands of *Phiſgil* and *Drummorel*; and the ſaid *John Stewart*, alias *Coltrain*, continued in the undiſturbed poſſeſſion of the eſtate of *Phiſgil* for ſeveral years after.——But *Agnes Stewart* the purſuer, having diſcovered that ſhe had a right to that eſtate by her grandfather's contract of marriage, which could not be defeated by any after gratuitous deed, inſiſted in a reduction of the entail, and obtained judgment in her favour upon the 15th *July* 1743; which was affirmed in the houſe of Lords.

Upon the death of *John Coltrain*, a queſtion having enſued between his relict and *Agnes Stewart*, concerning the validity of her liferent-infeftment upon the eſtate of *Phiſgil*, (See *Falconer*, *vol.* 2. N° 59.), the Lords, upon the 22d *February* 1749, " found, That the obligation " entered into by *John Coltrain* of *Drummorel*, afterwards *John Stewart* " of *Phiſgil*, in the marriage-ſettlement betwixt him and Mrs *Chriſtian* " *Herron*, the purſuer, whereby he was bound to ſettle upon her a life- " rent-proviſion, to the extent of *L.* 50 *Sterling* yearly, was onerous " on the part of the ſaid *Chriſtian Herron*, and rational on the part of " the ſaid *John Coltrain*, alias *Stewart*; and that he having imple- " mented the ſame, by granting the liferent-infeftment to that extent, " when he was in the right of fee and property of the eſtate of *Phiſgil*, " and his right ſubject to no challenge from any thing that did or could " appear upon the records, that infeftment was likewiſe juſt and one- " rous, and does ſubſiſt in her favour, notwithſtanding of the reduc- " tion afterwards brought, of the right and title of the ſaid *John Col-* " *train*, upon the latent perſonal obligation contained in the contract of " marriage entered into *in anno* 1668, betwixt *John Stewart* writer in *E-* " *dinburgh*, and *Agnes Stewart* his ſpouſe, whereby he was bound to ſettle " the eſtate he ſhould acquire in favour of the heir whatſomever of the " marriage; and notwithſtanding the decreet obtained in that reduc- " tion, ſetting aſide the right of the ſaid *John Coltrain*, which the Lords " found cannot hurt the ſaid onerous liferent-ſettlement made to *Chriſtian* " *Herron* the purſuer, by her ſaid huſband, while he ſtood in the full right " of property of the eſtate, conform to the infeftments and inveſtitures " thereof."——This decree was affirmed in the houſe of Peers; and in conſequence thereof, the relict continued to draw her liferent, to the extent

tent of *L.* 50 *Sterling*, out of the eſtate of *Phiſgil*, and the remaining 300 merks out of her huſband's paternal eſtate of *Drummorel.*

Agnes Stewart and her huſband afterwards brought an action againſt *John Coltrain*'s children, and the truſtees for his creditors, concluding, That as he had left a ſeparate eſtate, deſcendible to his heirs at law, and which had been originally burdened with his wife's liferent, the defenders ſhould be obliged to free, relieve, and diſburden the purſuer and her eſtate of *Phiſgil* of the aforeſaid liferent-annuity.

Anſwered for the defenders, The liferent provided by *John Coltrain* to his widow, was, in every reſpect, rational, and even moderate; neither is there the ſmalleſt appearance of his having had in view to do any wrongful act, to the prejudice of his heirs who might ſucceed in the eſtate of *Phiſgil*, or indeed that he had any apprehenſion, that he was to be excluded by other heirs from the poſſeſſion of that eſtate.—He was the only perſon that could be conſidered as proprietor of the eſtate at the time; and it has already been found, by the court of ſeſſion and houſe of Peers, That the ſecurity granted by him to his wife was an onerous and valid deed.——It does not therefore appear, upon what footing he or his heirs can be ſubjected to a claim of damages for granting this deed.——Had his relict, in place of getting a liferent-annuity, ſucceeded to a *terce* of the lands in which he ſtood infeft, by his deceaſe, before the challenge was brought, this terce muſt have been ſuſtained to exclude the purſuer; and, in that caſe, it ſeems plain, that there could have been no pretence to claim relief or repetition of the rents ſo drawn by the relict, againſt any ſeparate eſtate left by the huſband. It is true, the purſuer prevailed in a reduction of the tailzie, upon a perſonal ground of challenge competent to her by her grandfather's contract of marriage; but this reduction could have no effect *retro*. *John Coltrain* was the real proprietor of the eſtate by all the inveſtitures, before his right was brought under challenge; and conſequently, every lawful act of adminiſtration performed by him during that period, muſt have the ſame effect as if the challenge had never been brought. Suppoſe, for example, he had ſet long tacks at the old rent in terms of the tailzie, and the purſuer, after prevailing in the reduction, had found that ſhe could get double the rent, if the tacks were open; there is no doubt, that theſe tacks would have been ſuſtained, and the purſuer thereby deprived of a profit which ſhe might otherwiſe have reaped; and yet it ſeems impoſſible, that this could have founded her in any claim of damages.

The caſe of borrowing money is ſomewhat different. For there it might be ſaid, that the money was ſtill in his hands, and he ought not to be allowed to retain it.—But here there is nothing in the hands of *John Coltrain*, or his heirs, in conſequence of the liferent-infeftment granted to the widow.—— Nothing has been taken out of the eſtate, which either he or his heirs can be called upon to reſtore. The liferent-proviſion was ſuitable to his ſuppoſed circumſtances at the time; and neither he nor his heirs can be ſaid to have profited by it.

Replied, 1*mo*, It ſeems admitted, that if *John Coltrain* had granted an infeftment upon this eſtate, in ſecurity of borrowed money; though the creditor would have been ſecure, the purſuer would have had good action againſt *John Coltrain*, and his proper eſtate, to relieve the eſtate of *Phiſgil* of ſuch incumbrance; becauſe in ſo far he would have profited

fited in his private eſtate and patrimony. Now, upon this very principle, the purſuer falls undoubtedly to be relieved, in ſo far as reſpects the 600 merks originally ſecured upon *Drummorel*. For it is plain, that *John Coltrain*, by transferring this original proviſion to the eſtate of *Phiſgil*, was in ſo far profited in his own private eſtate. —— 600 merks was agreed to be a ſuitable proviſion out of the eſtate of *Drummorel*, and in ſo far that eſtate ought ſtill to take the burden, according to the defender's own principles.

2do, The purſuer apprehends, ſhe is well founded in her claim for a total relief. The favour of the law to onerous purchaſers, is, in many caſes, very great, and no leſs juſt: But that a party, who has charged an eſtate which did not of right belong to him, ſhould be intitled to the like favour, in order to keep his proper eſtate *indemnis*, ſeems unreaſonable, and contrary to the eſtabliſhed principles of law. A father who, by his marriage-contract, provides an eſtate to the heir of the marriage, remains fiar, and every ſecurity granted by him to creditors or onerous purchaſers, will be good; but if he has a ſeparate eſtate, the heir of the marriage is intitled to relief. In the ſame way, purchaſers and creditors contracting with an heir of entail, who neglects any of the formalities preſcribed by the act 1685, are ſecure; but the next heir of entail has action of relief againſt the other repreſentatives of that heir, who charged the tailzied lands with his proper contractions. For the ſame reaſon, though *John Coltrain*'s infeftment enabled him to grant an effectual proviſion to his wife, and her own *bona fides* protected her; yet his title being liable to challenge, and afterwards reduced, his ſeparate eſtate muſt be liable in relief of all incumbrances laid by him on the eſtate of *Phiſgil*.

" The Lords found the purſuer intitled to relief of the annuity of " 600 merks originally contracted to be paid out of the eſtate of " *Drummorel*, and thereafter transferred to that of *Phiſgil*; but " not intitled to any relief of the additional 300 merks, impoſed " on *Phiſgil* by the contract of marriage."

Pleaded in a reclaiming bill for the defenders, It ſeems to have been the intention of the court, to lay no greater burden upon the lands of *Drummorel* than the annuity of 600 merks, with which it was originally burdened by the contract of marriage; but as *Drummorel* at preſent ſtands charged with 300 merks of the lady's annuity, by the bond of proviſion in 1734, the above interlocutor, by transferring 600 merks from *Phiſgil* to *Drummorel*, burdens this laſt eſtate with 900 merks of the annuity, and leaves only 300 merks as a burden upon *Phiſgil*.—— The defenders admit, that in ſo far as *John Coltrain* can be ſaid to have profited in his private eſtate and patrimony, by an incumbrance laid on the eſtate of *Phiſgil*, he and his heirs are liable in relief to the purſuer.—— In ſo far, therefore, as he freed his own eſtate of a jointure to his wife, ſuitable and adequate to the circumſtances of that eſtate, he may be conſidered as a profiter, and may be obliged to relieve the eſtate of *Phiſgil:* but to no greater extent; becauſe he was in no ſhape *lucratus*, by eſtabliſhing an additional jointure upon the eſtate of *Phiſgil* ſuitable to that eſtate, of which he was truly proprietor at the time.— The purſuer therefore ought not to be intitled to have her lands relieved of any more than 300 merks of the above annuity; which, added to the

the 300 already payable out of *Drummorel*, will make a burden upon that eſtate of 600 merks yearly, being the amount of the original annuity.

Anſwered, By the judgment of the court in 1749, ſuſtaining the widow's claim to an annuity out of the eſtate of *Phiſgil*, her claim is not ſuſtained to the full extent of her huſband's poſtnuptial deed, but only in ſo far as it was onerous, *viz.* to the extent of 900 merks contained in the contract of marriage.——It is therefore a point adjudged, that the widow had no title to demand the additional 300 merks out of the eſtate of *Phiſgil*. This was a voluntary gratuitous deed, which could not be effectual againſt the eſtate, after the title of the granter was reduced; and therefore, in this queſtion, the matter muſt be conſidered as if no additional annuity had been granted. I. C.

"The Lords, on the 21ſt *January* 1761, adhered."

Act. *Garden* and *Lockhart*. Alt. *Ferguſon* and *Advocatus*.

N° CCLIV. 5th *December* 1760.

Mrs EUPHAME HAMILTON and HUSBAND,

AGAINST

Mr ARCHIBALD HAMILTON of *Dalziel*, Advocate.

Rents unuplifted during apparency, do not belong to the apparent heir's executor, but to the next heir in the eſtate.

UPon the death of Sir *Hugh Hamilton* of *Roſehall*, a competition aroſe concerning his eſtate of *Roſehall*, betwixt his daughter Miſs *Marion Hamilton*, and his nephew Mr *Archibald Hamilton* of *Dalziel*. —— Before this competition was concluded by a final interlocutor, Miſs *Marion Hamilton*, who had entered into poſſeſſion as apparent heir to her father, died in a ſtate of apparency, and without having uplifted the whole rents which had fallen due during her poſſeſſion.

After her death, Mr *Archibald Hamilton* ſerved himſelf heir of tailzie to Sir *Hugh*, the perſon laſt infeft in ſaid eſtate; and obtained decreet in his baron-court againſt the tenants, for the rents remaining in their hands, and which had become due under Miſs *Hamilton*'s apparency. — Mrs *Euphame Hamilton*, as executrix confirmed to her, likewiſe brought a proceſs againſt the tenants for payment of theſe rents; upon which the tenants raiſed a multiple-poinding, and the competing parties having appeared for their intereſt, the cauſe was taken to report.

Pleaded for Mrs *Euphame Hamilton*, Though by the ſtrict principles of the feudal law, certain formalities were requiſite to tranſmit and veſt the feudal right of lands, and ſome of theſe forms are ſtill kept up; yet the genius of the law of *Scotland*, eſpecially in later times, has been to make the tranſmiſſion of property from the dead to the living as eaſy as poſſible, and to throw off every unneceſſary ſuperfluity. Thus, though by the former practice, confirmation was neceſſary to tranſmit

moveable ſucceſſion, and any ſubject omitted out of the inventory was held to remain *in hereditate jacente*, it is now eſtabliſhed, that poſſeſſion alone, by the neareſt of kin, is ſufficient to veſt and tranſmit the ſubjects poſſeſſed; and confirmation of one particular ſuffices to veſt the whole. In heritable ſucceſſion, even by our moſt ancient law, apparent heirs enjoyed many rights and privileges, particularly that of continuing the predeceſſor's poſſeſſion: from whence aroſe their right to the interim rents of the predeceſſor's eſtate during their own poſſeſſion. This right requires no ouvert act of the apparent heir, but is the operation of the law itſelf, which holds him to be in poſſeſſion from the moment his predeceſſor dies; and in this reſpect he is ſuppoſed to be *una et eadem perſona cum defuncto.*

The apparent heir's poſſeſſion has received ſo much countenance from the ſtatute-law of this country, that by act 24. parl. 1695, he can charge the eſtate, *in valorem*, with all his onerous debts and deeds: and if this poſſeſſion has ſo ſtrong an effect with regard to the fee of the eſtate, how much more ſtrongly ought it to operate with regard to the interim rents? The apparent heir gets credit, from a belief, that the rents belong to him during his poſſeſſion; but it would be attended with fatal conſequences, if this right evaniſhed upon his death. Accordingly, it is underſtood to be undoubted law, that his creditors can attach the unuplifted rents after his death, which can only be upon this principle, That the right of apparency and poſſeſſion of the eſtate is a legal title to the rents, whether uplifted or not. And indeed the very point now in queſtion was ſolemnly determined in the late caſe of *Houſton* of *Johnſton* againſt *Stewart Nicolſon*, 28th *January* 1756; where the deciſion went in favour of the apparent heir's executor. And a variety of deciſions and authorities were there adduced, all tending to ſhew, that the apparent heir's power over the rents is not a bare perſonal privilege or faculty, which he may exerciſe, and which dies with him; but that it is a *right*, and, as every other right, muſt tranſmit to his repreſentatives.

Argued for Mr *Hamilton*, By the law of *Scotland*, all land-property is underſtood to be held of a ſuperior, who retains the *dominium directum*, and the vaſſal acquires the *dominium utile*. No vaſſal can have a right to lands, without a charter or warrant to infeft from the ſuperior, and inſtrument of poſſeſſion following thereon. Hence the maxim, *Nulla ſaſina, nulla terra:* And hence alſo, when this precept or warrant is once executed, the effects of it cannot be tranſmitted by the vaſſal, either to heirs or ſingular ſucceſſors; but the latter muſt obtain a new precept from the ſuperior, and the feudal right is not effectually veſted in the former, till ſuch time as having brought a proof that he is the heir in the inveſtiture, he obtains a renovation of the feu from the ſuperior, and precept for infeftment; upon which he is accordingly infeft.

From theſe principles, it clearly follows, that as an apparent heir has no title to the lands themſelves, ſo neither has he to the rents. Theſe rents belong to the ſuperior by the caſualty of non-entry, if he chuſes to claim them; and if he does not, they remain a part of the inheritance, to be taken up by the next heir who ſhall make up proper titles to the eſtate. And therefore, if an heir dies unentered, it is contradictory to the rules of law, that he ſhould tranſmit to his executors a right to the rents, which did not belong to himſelf. That the rents a-

riſing

riſing after the vaſſal's death are tranſmitted with the lands themſelves, is aſcertained by the effects given to adjudications led againſt the deceaſed vaſſal's eſtate, whether *cognitionis cauſa*, or upon a charge to enter heir: For, by the *firſt*, the rents fallen due after the vaſſal's death, are always carried as part of the *hereditas jacens*; and by the other, a charge to enter being equivalent to a ſervice, that ſervice, by taking up the *hereditas jacens* of the predeceſſor, is underſtood likewiſe to carry the rents that have ariſen after his death. Theſe things are altogether inconſiſtent with the notion, that the rents belong of right to the apparent heir; for if the right was once in him, how could he be diveſted of it, ſo as to reinſtate it in the defunct, to paſs as part of his inheritance?

It is true, the law, or rather the deciſions of the judges, have, on account of the intimate connection the apparent heir has with the eſtate, given him, ſtep by ſtep, certain privileges, *viz.* to continue in poſſeſſion of the manſion-houſe, defend againſt intruders, and, leſt the rents ſhould periſh in the tenants hands, he may likewiſe uplift the rents, if the tenants are willing to pay. But theſe were introduced *præter juris regulas*; it being anomalous, that a perſon who has no right to the lands, ſhould, without deriving right from any proprietor, be intitled to the rents and profits. To extend them farther, would be extremely dangerous; ſince departing from principles is productive of confuſion, uncertainty, and arbitrary deciſions. However far theſe privileges have gone, which were at firſt but ſparingly indulged, there is no deciſion granting a full and abſolute property to an apparent heir, in the rents unuplifted during his apparency. In the caſe of *Oliphant* againſt his tenants, 19th *February* 1663, the court at firſt refuſed to allow the apparent heir to uplift the rents, and only indulged it, leſt the rents ſhould periſh, and upon the heir's finding caution to warrant the tenants at all hands. The caſe of Lady *Tarſappie*, 1662, proceeded upon principles of equity and favour; and as it only found the mother intitled to her ſon, the apparent heir's aliment out of the unuplifted rents, which, during her lifetime, ſhe might have uplifted and applied to that purpoſe, it does not prove, that the heir's right to the rents was ſo complete as to tranſmit them to his repreſentatives. The caſe of *Macbrair* in 1683, as obſerved by Lord *Harcus*, voce, *Airs*, N° 44. makes for Mr *Hamilton*; and the court decided upon the ſame principles, in the caſes, *Ballantyne* againſt *James Bonnar*, 1683; and *Balgone* againſt *James Hay*, *February* 1688; both obſerved by Lord *Harcus*, voce, *Airs*, N° 60. and 71. The two authors of the lateſt Inſtitutes have given their opinion in the ſame way; Lord *Bankton*, *vol.* 2. *p.* 324. and *Erſkine*, *p.* 222. —— Lord *Stair*, indeed, ſeems to waver a little, upon account of the deciſion in the caſe of *Tarſappie*; but his opinion in the main is agreeable to the principles above laid down. See *b.* 2. *tit.* 3. § 16. *in fine*. Neither does the deciſion in the caſe of *Houſton* of *Johnſton* againſt *Stewart Nicolſon*, eſtabliſh a contrary doctrine; for the executor was there preferred, not entirely upon the general point of law, but upon ſpecialties which occurred in that particular caſe. Mr *Houſton* pleaded, That the *intereſts* were *in bonis* of Sir *John Houſton*, not only as apparent heir in Lady *Houſton*'s obligation, but alſo as creditor in the obligation; neither was any ſervice neceſſary

to

to veſt the right to them in the apparent heir; and the deciſion proceeded upon a complex view of the caſe.

Suppoſing the apparent heir to have a *right of poſſeſſion*, which intitles him to the rents, ſtill this right can go no further than the poſſeſſion itſelf, otherwiſe it would become a right of property. A *bona fide* poſſeſſor, if he loſes poſſeſſion of a ſubject, has no claim to the rents of it. In like manner, an apparent heir can only be intitled to ſuch of the rents as he poſſeſſes and uplifts: For it is in vain to contend, that the right of poſſeſſion devolves upon him *ipſo jure*, and without his knowledge; ſince, at that rate, every heir muſt, without any act of his, neceſſarily incur the univerſal paſſive title of *pro herede geſtio*. Neither can any argument be drawn from the act 1695: for that correctory ſtatute does not give any new right to an apparent heir three years in poſſeſſion; it only makes the next heir liable *paſſivè* for his onerous deeds; but the apparent heir's legal right in the eſtate is not thereby increaſed.

" The Lords found, That Mr *Hamilton*, the heir, was preferable to Mrs " *Euphame Hamilton*, the executrix of Miſs *Hamilton*, the laſt appa- " rent heir, to the rents falling due during the apparency, and " remaining unuplifted." I. C.

For Mrs *Euphame Hamilton*, *Lockhart*, *Ferguſon*. For *Dalziel*, *And. Pringle*. Reporter, Juſtice-clerk. Clerk, *Home*.

N° CCLV. 9th *December* 1760.

Mrs PORTERFIELD,

AGAINST

JOHN GRAY, *&c.* Truſtees of *James Finlayſon*.

A father becomes bound in his contract of marriage to ſecure a certain ſum to the heirs and bairns of the marriage: The children tranſmit this jus crediti *to their heirs and ſingular ſucceſſors, without a ſervice.*

MR *Francis Finlayſon* miniſter at *Kilmarnock*, in his contract of marriage with *Margaret Hunter*, in 1703, bound himſelf to lay out and employ 5000 merks of his own, together with 2500 merks of tocher paid him with his wife, and to take the ſecurities to himſelf and his ſpouſe, and the longeſt liver of them two, in liferent, and *to the heirs or bairns of the marriage in fee*; and to provide the one half of the conqueſt of the marriage to his ſpouſe in liferent, and the whole of that conqueſt to the heirs and bairns of the marriage in fee.

In 1707, Mr *Finlayſon* took from *Crawford* of *Crawfordland* two bonds, the one for 3500 merks, the other for 1000 merks, to himſelf and his ſpouſe, and longeſt liver of them two, in liferent, and to himſelf, his heirs, executors, or aſſignees, in fee.

Soon after the date of theſe bonds, Mr *Finlayſon* died, leaving only one child of the marriage. His widow lived till the year 1757, and liferented theſe bonds. *Hugh Finlayſon*, the only child of the marriage, died

died in 1754, without making up any titles to his father. About ſix months before his death, he had executed a diſpoſition in favour of *James Finlayſon* writer in *Edinburgh*, his couſin, whereby he conveyed to him particularly, all ſubjects, heritable and moveable, "then pertaining and reſting, or which ſhould be pertaining and reſting to him "at his death, and to which he may ſucceed and have right by and "through the deceaſe of Mr *Francis Finlayſon*, his father." By another deed of the ſame date, he appointed the ſaid *James Finlayſon* his executor and univerſal legatar.

In 1755, *James Finlayſon* conveyed to *John Gray* and others, as truſtees for certain purpoſes, all ſubjects, heritable and moveable, then pertaining to him, or which ſhould pertain to him at the time of his death; "and particularly the whole debts and ſubjects to which he had "right by the diſpoſition in his favour by the ſaid *Hugh Finlayſon*." Of the ſame date, he appointed the ſaid truſtees his executors and univerſal legatars.

Upon the death of *Margaret Hunter*, the widow of Mr *Francis Finlayſon*, the truſtees confirmed themſelves executors to *James Finlayſon*, and gave up in inventory the two bonds due by *Crawfordland*.

Mrs *Porterfield* procured herſelf decerned executrix *qua* neareſt of kin to Mr *Francis Finlayſon*, obtained a licence to purſue, and brought a proceſs before the court of ſeſſion againſt *Crawfordland*, for payment of the two bonds above mentioned. Mr *Crawford* brought a proceſs of multiple-poinding, and the parties appeared to diſpute their preference.

The queſtion upon which the deciſion of the cauſe depended, was, Whether *Hugh Finlayſon*, the creditor in the obligation in his father *Francis*'s contract of marriage, could ſue for implement of that obligation, or tranſmit the *jus crediti* to his repreſentatives or aſſignees, without a ſervice as heir of proviſion to his father.

Pleaded for the truſtees, It is an eſtabliſhed point in the law of *Scotland*, That obligations and proviſions made in contracts of marriage, in favour of children of the marriage, conſtitute ſuch children creditors in the obligation and proviſion, ſo as to intitle them to challenge and reduce gratuitous or fraudulent deeds made by the father, to the prejudice of theſe proviſions; *Stair*, *p.* 462. This is ſo firmly eſtabliſhed, that the children can purſue their father for implement during his life; 13th *February* 1677, *Fraſer contra Fraſer*; *March* 1684, *Panton contra Irvine*; 31ſt *January* 1705, *Cairns contra Cairns*. It is evident, therefore, that children, in ſuch caſes, are juſt and proper creditors, and are not to be conſidered as heirs of proviſion, as it would be abſurd to ſuppoſe an heir during the life of his anceſtor.

If the father has implemented the obligation in his contract of marriage, by laying out the ſum ſtipulated, and taking the ſecurities as therein directed, the obligation is fulfilled, and the *jus crediti* that was in the children is ſatisfied. In ſuch a caſe, the children muſt ſerve themſelves heirs of proviſion, becauſe there is a ſpecial ſubject in which the ſucceſſion is deſtined to them; and which, as in the caſe of other ſucceſſions, may be taken up by a ſervice. But if the father did not implement the obligation, by making ſpecific proviſions in terms thereof; there being no ſpecial ſubject in which the children could ſucceed as heirs of proviſion, nothing remained to them, but the *jus crediti*

conſtituted by the contract of marriage. As creditors in the obligation, therefore, they could only have an action againſt their father's repreſentatives, to implement his obligation, by payment of the proviſion ſtipulated. As the children were creditors in ſuch obligation, even during their father's lifetime, the right which was veſted in them from their birth, muſt tranſmit to their repreſentatives or ſingular ſucceſſors, without the neceſſity of a ſervice; 13th *January* 1665, *Wallace contra Wallace*; 28th *July* 1688, *Chalmers contra Chalmers*.

As this *jus crediti* is veſted in the children without a ſervice, it muſt follow, that no ſervice is requiſite to impower them to tranſmit their right to their heirs or ſingular ſucceſſors: and ſo it has been often decided; 7th *December* 1697, *Cumming contra Kennedy*; 3d *February* 1732, *Campbell contra Duncan*.

Agreeable to theſe principles and deciſions, as the *jus crediti* of the obligation incumbent upon *Francis Finlayſon* the father, was fully eſtabliſhed, without a ſervice, in the perſon of *Hugh Finlayſon*, the only child of the marriage; the truſtees, his aſſignees, have right to demand implement of that obligation from Mr *Francis*, his heirs or executors; and conſequently they muſt be preferred to Mrs *Porterfield*, who claims as his executor.

Anſwered for Mrs *Porterfield*, Where a ſubject is provided by a contract of marriage to the father in liferent, and to the heirs or bairns of the marriage in fee, the father is ſtill conſidered as the fiar, and the children can only ſucceed to him as heirs of proviſion; *Stair*, *p.* 478.; *Dirleton*, *tit. Fee*, *queſt.* 1.; and Sir *James Stewart*'s *anſwer*. Thus it has been decided in the following caſes; *July* 9. 1630, *Veitch contra Robinſon*; *February* 10. 1672, *Wemyſs contra Macintoſh*; *February* 4. 1681, *Thomſons contra Lawſons*; *November* 25. 1735, children of *Frog contra* his creditors. It is evident, therefore, that the fee of the proviſion in the contract in queſtion was in Mr *Francis Finlayſon*, and was liable to be affected by his debts.

This being eſtabliſhed, it is certain, that where-ever a fee belongs to a man at the time of his deceaſe, deſcendible to his heirs, the rule of law is, that the heirs muſt take by ſervice. From this rule there are only two exceptions, *nominatim* ſubſtitutes in bonds, and heirs who ſucceed in tacks. It is alſo certain, that when any particular ſubjects, whether lands, tenements, annualrents, or ſums of money, are veſted in the perſon of a man during his life, under a deſtination to heirs of a marriage, theſe heirs cannot take without a ſervice.

The only remaining queſtion is, Whether an obligation to provide a ſum or ſubject in the above terms, muſt require the ſame title, as if the ſum or ſubject was actually veſted? The analogy of law requires that it ſhould be ſo, and the general current of deciſions confirms it. Suppoſe a proprietor executes a tailzie of his eſtate in favour of himſelf, and the heir of a ſecond marriage; if the deed contains procuratory and precept, the heir cannot execute them, without ſerving himſelf heir of proviſion. If there is no procuratory or precept, a ſervice is ſtill neceſſary. The heir of line cannot be obliged to diſpone the lands to the heir of entail, nor can he take ſuch a diſpoſition without a ſervice; becauſe the entail is not conceived directly in his favour, but under a ſubſtitution; and it is neceſſary that he ſhould demonſtrate by a ſervice, that he has the right by this ſubſtitution. The only thing that has

has given occaſion to any diſpute upon this head, is, that it may ſometimes happen, that an action may be neceſſary to the heir of the marriage, where a ſervice is impoſſible, becauſe the father is alive: And from thence it is argued, that an action is alſo competent to the heir after his father's death, and that he may alſo tranſmit his right without a ſervice. An heir may, indeed, purſue his father during his life; not to give him the ſubject, but to ſecure it in terms of the contract: but when the father dies, a ſervice is ſtill neceſſary before the heir can take the ſubject which has thus been veſted in his father; *July* 21. 1676, *Hay* of *Drummelzier contra* the Earl of *Tweeddale*; *February* 1682, Sir *John Clerk* of *Pennycuik contra* his ſiſters and Mr *David Forbes*; *November* 28. 1684, *Irvine contra Macitrick*; *July* 26. 1715, *Lyon contra Garden* of *Laten*; *December* 27. 1716, and *January* 23. 1717, *Macintoſh contra* Laird of *Aberairdor*.

This doctrine appears to be contradicted by the deciſion, *Campbell* againſt *Duncan*. This deciſion, however, when ſtrictly examined, will appear to be contrary to all the principles of law that have been hitherto eſtabliſhed; and as the ſubject in controverſy was but trifling, the objection to the title met with leſs attention than otherwiſe it would have done.

Replied for the truſtees, A ſervice is indeed neceſſary, when any particular ſubject is veſted in the father's perſon; but when no ſum, nor any ſubject whatever, is laid out in terms of the contract of marriage, there is nothing in which the heir can be ſerved. Nothing remains to the children but their *jus crediti*, which they muſt make good by an action.

" The Lords preferred the diſponees to *Jean Finlayſon*, the executrix " of Mr *Francis Finlayſon*." P. M.

For the truſtees, *A. Pringle*. Alt. *Miller* and *Fergusſon*. Reporter, Juſtice-clerk. Clerk, *Home*.

N° CCLVI. 10th *December* 1760.

COMPETITION of APPINE's CREDITORS.

1. *A creditor intruſted with the key of his debtor's houſe, and an inventory of his furniture,* &c. *found not to have any right either of impignoration or retention in theſe effects.* 2. *Competition between an arreſtment in the hands of ſuch depoſitar, and an arreſtment in the hands of another, to whom he had transferred the natural poſſeſſion of the furniture.*

DOugal *Stewart* of *Appine*, perceiving his affairs to be in diſorder, left *Scotland* in *April* 1756, in order to be out of the reach of his creditors; and before his departure, he put the keys of his houſe in *Edinburgh*, together with an inventory of his plate, houſehold-furniture, and books, into the hands of a friend, *Thomas Fraſer* writer in *Edinburgh*; who, at the ſame time, was creditor to him in a bond for *L.* 131 *Sterling*, bearing date the 3d *April* 1756.

Thomas Fraſer ſoon after removed the plate, and a part of the furniture, from *Appine*'s houſe, and lodged them in a ware-room belonging

ing to *Francis Brodie* wright in *Edinburgh*. *Brodie* gave his receipt, obliging himſelf to reſtore the goods to *Fraſer*; and *Fraſer*, on the other hand, promiſed to pay him the cellar-rent; and paid it accordingly.

Upon the 26th of *May* thereafter, *Alexander Stewart* of *Edinglaſſie*, one of *Appine*'s creditors, uſed arreſtment in the hands of *Francis Brodie*; and in *June* following, *John Campbell* of *Barcaldane*, another of the creditors, laid on an arreſtment in *Fraſer*'s hands; who raiſed a proceſs of multiple-poinding, containing a concluſion to have it found, That the goods were pledged in his hands in ſecurity of a debt owing him by *Appine*; or at leaſt, that he had a right of retention of theſe goods, until he ſhould operate his payment. And in evidence of the impignoration, he produced a letter from *Appine*, of date 31ſt *July* 1756, in theſe terms. "Dear *Thomas*, I am ſurpriſed that any body "ſhould give you any trouble concerning my furniture, eſpecially as "the ſame was left in your hands in further ſecurity of a debt I owe "you above its value."

Pleaded for *Thomas Fraſer*, The intention of the common debtor, in putting the goods into his poſſeſſion, was, that they might remain with him as a pledge in ſecurity of the debt which he owed him. And although this was not expreſſed by any written document, at the time of putting the goods into his hands, the preſumption is, that ſuch was the meaning of parties.——Poſſeſſion of moveables preſumes right in them; and therefore it is not incumbent upon *Fraſer* to bring any evidence of the actual impignoration. At the ſame time, there is poſitive evidence of it from the letter in proceſs. And it is plain, that *Fraſer* has all along acted upon the full belief, that he had a right of pledge on the goods; otherwiſe it might have been an eaſy matter for him to have aſſigned *Appine*'s bond to a truſtee, and to have poinded or arreſted in his own hands.

2*do*, As he has the effects of the common debtor *bona fide* in his hands, he is intitled to retain them until he get payment of his debt. This right of retention he certainly could have uſed againſt *Appine* himſelf; and as an arreſtment does not transfer the property, nor is a *ceſſio in jure*, the creditor who arreſts, and purſues a forthcoming, muſt inſiſt in the right of the debtor; and conſequently muſt be liable to every exception that is competent againſt the common debtor. Upon theſe principles the Lords have decided in ſundry caſes; 16th *December* 1707, *Lees contra Dinwiddie*; and 14th *June* 1755, creditors of *Glendinning*.

Anſwered for *Campbell* and *Stewart*, Mr *Fraſer* muſt prove the actual contract of pledge; for poſſeſſion of moveables can never preſume impignoration. The letter founded on by *Fraſer* can have no weight in the argument; becauſe it was obtained *ex poſt facto*, after *Appine* had become *notourly bankrupt*, and after the goods had been attached by arreſtment. It is plain, that *Fraſer*, at the time he received the inventory from his friend *Appine*, did not conſider himſelf as having any right of pledge in the goods, otherwiſe he would have taken care to have had this expreſſed in a docket ſubjoined to the inventory. And it appears from *Brodie*'s oath in the forthcoming, that the goods were put into his cuſtody, as goods belonging to Mr *Stewart* of *Appine*.

Neither

Neither can *Fraſer* have any right of retention of theſe goods, in competition with the creditors-arreſters. For, in the *firſt* place, He is not in the natural poſſeſſion of them: and though it may be competent to arreſt in his hands, becauſe he is anſwerable for the goods to *Appine*; yet he has not ſuch a poſſeſſion as can intitle him to plead retention in his own hands, either againſt *Appine* himſelf, or his creditors-arreſters.—— 2*dly*, Suppoſing the goods were in his natural poſſeſſion, they were delivered to him upon the footing of a *depoſitum*; and it is *triti juris*, that a *depoſitum* muſt be reſtored, and that no right of compenſation or retention can be pleaded againſt it.

"The Lords found, That there was no evidence of the impignoration "in the hands of *Thomas Fraſer*; and that he had no right of re- "tention."

Campbell then inſiſted, That his arreſtment in the hands of *Fraſer*, though poſterior in time to that of *Stewart* in the hands of *Francis Brodie*, was preferable, in reſpect that the arreſtment in *Brodie*'s hands was an improper diligence.

Pleaded for *Campbell*, That *Fraſer* was the proper cuſtodier of the goods, and the perſon liable to *Appine* for redelivery of them. *Fraſer* was intruſted by *Appine* with the management of them; and it made no difference, whether he kept them in his own natural poſſeſſion, or committed the keeping of them to others. It is true, he lodged them for ſafety in a ware-room belonging to *Brodie*; but *Brodie* gave his receipt to *Fraſer* for them, was bound to redeliver them to him, and received his cellar-rent from him.—— It is plain, therefore, that *Fraſer* is the perſon who is anſwerable to *Appine* for the ſafety of the goods; he is liable to him in a perſonal action for reſtitution of them; and, conſequently, it was proper and competent to arreſt in *Fraſer*'s hands: and this point being once eſtabliſhed, it ſeems to follow, that the arreſtment in *Brodie*'s hands was an inept diligence; for an arreſtment of the ſame ſubject cannot be effectually laid on in the hands of two different perſons. — If the perſon who is intruſted with the cuſtody of goods, has transferred the natural poſſeſſion of them to a ſervant or factor, he ſtill remains the proper cuſtodier of them, and the only perſon in whoſe hands arreſtment can be uſed.—— *Brodie* had no connection with *Appine*; *Fraſer* was his employer; and the prohibition in *Stewart*'s arreſtment could not hinder *Fraſer* from taking up the goods from *Brodie* whenever he inclined. Upon theſe principles it has been decided, That an arreſtment uſed in the hands of a truſtee or factor of the debtor to the common debtor was inept; *Dictionary*, *vol.* 1. *p.* 57.; and 12th *December* 1752, *Campbell.*

Pleaded for *Stewart*, The arreſtment in the hands of *Fraſer* was inept; becauſe the goods were not in his poſſeſſion. All that appears, is, that he acted the part of a friend or ſervant in overſeeing the carriage of them from *Appine*'s houſe to that of *Brodie*, who from that time became cuſtodier of them. In the *next* place, Suppoſing it to have been competent to uſe arreſtment in *Fraſer*'s hands, yet there can be no doubt, that it was likewiſe competent to arreſt in the hands of *Brodie*, who was in the actual poſſeſſion of the goods; and the arreſtment in *Brodie*'s hands, being prior in date, muſt be preferred. *Brodie* cannot be conſidered merely as a ſervant of *Fraſer*'s; for if *Appine* had appear-

ed, and claimed the goods from *Brodie*, he could not have refuſed to deliver them up; and in the ſame way he muſt deliver them up to a creditor of *Appine*'s, who arreſts in his hands.

" The Lords were of opinion, That both the arreſtments were good; " but preferred *Alexander Stewart*'s arreſtment in the hands of " *Francis Brodie*, as being prior in time."

N. B. Barcaldane did not inſiſt for a *pari paſſu* preference upon the act of ſederunt 9th *Auguſt* 1754; becauſe his execution of arreſtment had not been recorded within the time preſcribed by the act. P. M.

For *Fraſer*, *D. Dalrymple*. Reporter, Juſtice-Clerk. For *Stewart*, *W. Stewart*. Clerk, *Home*. For *Campbell*, *Ilay Campbell* and *Ferguſon*.

N° CCLVII. 11th *December* 1760.

WADES,

AGAINST

The HEIR of MARSHAL WADE.

Sums ſecured by adjudication, carried by a general clauſe of all debts and ſums of money.

MArſhal *Wade*, upon the 5th of *May* 1747, executed at *London* a deed in the *Scots* form, by which he diſponed to *George* and *John Wades*, his natural ſons, " all and whatſoever debts and ſums of money, real " or perſonal, reſting or due to him by any perſon or perſons in *Scot-* " *land*, by bond, bill, account, or any other manner of way." A particular clauſe was afterwards ſubjoined, by which he bound his heirs and ſucceſſors, to ſubſcribe and deliver to his ſaid ſons equally betwixt them, valid and ample diſpoſitions and aſſignations of the whole premiſſes, containing procuratories of reſignation, precepts of ſeiſin, and all other neceſſary clauſes.

The only ſubjects which belonged to Marſhal *Wade* in *Scotland*, at the time of his death, were certain tack-duties due by the *York-building* company, ſome of them ſecured by adjudications, in the following manner. Sir *Alexander Murray* of *Stanhope* granted a leaſe of his mines in *Tweeddale* and *Argyleſhire* to the Duke of *Norfolk*, Marſhal *Wade*, and others, for thirty years, commencing 25th *March* 1725. Theſe partners granted a ſubtack to the *York-building* company, for payment of the tack-duty to Sir *Alexander Murray*, and an additional ſum of *L.* 3600 *Sterling* yearly. For ſecurity of this additional ſum, the company did infeft the Duke of *Norfolk* and his partners in their eſtates in *Scotland*, for payment of an annuity of *L.* 3600 *Sterling*, equivalent to the tack-duty.

The *York-building* company having failed in payment of theſe tack-duties, the partners uſed inhibition againſt them; and in the years 1732, 1736, 1738, and 1746, deduced different adjudications of the company's eſtates, for payment of the duties that were then due, and for

for ſecurity of what ſhould become due thereafter, during the continuance of the leaſe.

Marſhal *Wade*'s ſons brought a proceſs againſt *William Wade* his nephew and heir at law, concluding, That he be decerned to make up titles to theſe adjudications, and convey them to the purſuers, in terms of the diſpoſition above mentioned. The defence inſiſted upon for the heir at law was, That the foundation of the claim being a general diſpoſition of all debts and ſums of money reſting by bond, bill, *&c.* it could not carry a right to the accumulate ſums in theſe adjudications, in reſpect an adjudication is to be conſidered as a legal ſale or diſpoſition to the debtor's lands, redeemable upon payment of the debts, and ſo not comprehended under the general deſcription of debts or ſums of money.

Pleaded for the purſuers, The original debt is ſtill due to the creditor, after he has led an adjudication for his ſecurity, as well as before. It is ſtill competent to the creditor, to uſe perſonal diligence by horning and caption againſt the debtor. He may adjudge any other ſubject belonging to him, poind his moveables, or affect his perſonal eſtate by arreſtment. This demonſtrates, that his debt ſtill ſubſiſts, and is not extinguiſhed by the adjudication. A proper wadſet is in a very different ſituation: The money is ſunk as the price of the lands, and is no longer a debt, till requiſition is uſed. An adjudication is no voluntary purchaſe, but a diligence which a creditor is obliged to uſe for recovering payment of his debt. Though, in ſome views, it may be conſidered as a ſale againſt the debtor, ſo as to deprive him of the right of redemption, if he does not uſe it in due time; yet, with regard to the creditor, it is never conſidered in ſuch a view as to extinguiſh his debt, but only as a right in ſecurity, which he may relinquiſh at pleaſure, and betake himſelf to any other method of recovering his debt that he ſhall think beſt.

As an adjudication is conſidered to be a *pignus prætorium* with regard to the creditor, it is alſo conſidered in the ſame view with regard to the debtor, when ſuch is his intereſt. Thus the adjudger who enters into poſſeſſion is obliged to account for his intromiſſions, in the ſame manner as every other creditor who enters into poſſeſſion upon a right in ſecurity; and if he is paid within the legal, his diligence is declared by the act 1621 to expire *ipſo facto*. If the adjudication was conſidered as a ſale, whether redeemable or irredeemable, it could never be extinguiſhed by intromiſſions.

In like manner, compenſation is pleadable againſt a debt ſecured by adjudication; *June* 18. 1675, Laird of *Leys* againſt *Forbes*; 12th *November* 1675, *Home* againſt *Home*; *March* 1682, Lord *Saline* againſt *Callendar*; *March* 17. 1682, *Baillie contra Hillſide*. On the other hand, it is equally certain, that compenſation cannot be pleaded upon a ſum ſecured by proper wadſet, before requiſition; *November* 12. 1675, *Home contra Home*. The reaſon is, that, until requiſition, there is no debt; which clearly ſhows the difference betwixt the nature of a wadſet-right and an adjudication.

Anſwered for the defender, An apprifing in the oldeſt ſtatutes, confirmed by the opinion of lawyers, is uniformly conſidered to be a legal ſale under redemption: and though it may be true, that, notwithſtanding the adjudication, the creditor is at liberty to uſe diligence upon

on his original ground of debt; and though he may uſe it as a ground of compenſation to that extent; yet that will not change the nature of the diligence, or prove that it is not a proper ſale, redeemable upon payment of the debt.

That this was conſidered as the nature of an appriſing, is evident from the following authorities; *Leg. Burg. cap.* 94. 95.; *Stat. Alex.* II. *cap.* 24.; *Rob.* I. *cap.* 9.; *Ja.* III. *act* 36. This is more particularly and fully explained in the act 1469, with Sir *George Mackenzie*'s obſervations upon it. An appriſing, therefore, was always looked upon as a legal vendition and alienation of the debtor's lands, under redemption, in the ſame manner as a contract of wadſet. Though ſeveral alterations have been introduced by the ſubſequent ſtatutes, with regard to appriſings and adjudications; yet there are no words in any of theſe laws, that point out an alteration in the original nature of appriſings. Agreeable to this reaſoning, the court decided, 19th *November* 1680, *Dalgarnock contra Tolquhoun*; and 3d *February* 1738, *Eliſabeth Ramſay contra* the creditors of *Clapperton.*

No regard can be paid to what was pleaded for the purſuers, That an adjudication bears no reſemblance to a contract of wadſet, where the wadſetter is not conſidered as a creditor, till after requiſition; whereas, an adjudication is not a voluntary purchaſe, but is conſidered as a right in ſecurity, which the creditor may relinquiſh when he thinks proper. Suppoſing this to be true, it does not follow, that an adjudication is not a judicial ſale, or that the creditor is not conſidered as proprietor, until the land is redeemed, or he renounces the diligence. Beſides, neither Marſhal *Wade*, nor the purſuers, have ever ſhown any inclination to renounce what intereſt they may have in the ſeveral adjudications, or the infeftments following thereupon.

It cannot alter the caſe, that, by the act 1621, an adjudger, who enters into poſſeſſion, is obliged to account for his intromiſſions, like any other creditor in ſecurity; and, ſo ſoon as he has uplifted enough to pay his debt, that the adjudication expires *ipſo facto.* This equitable regulation was introduced to preſerve an equality betwixt the appriſer and the reverſer; but, in every other particular, the ſtatute left appriſings upon the ſame footing as formerly. This was the opinion of the court in the above-mentioned caſe, *Ramſay* againſt the creditors of *Clapperton.*

The defender cannot admit, that compenſation is pleadable in the preſent caſe. The deciſions appealed to by the purſuers, do not ſeem to be clear, or agreeable to the principles of law: *Legibus, non exemplis, judicandum.* In the caſe of *Saline*, Lord *Harcus* obſerves, that this point was not fully conſidered. In order to found compenſation, there muſt be a debtor and a creditor to make a concourſe: but as there is no debtor, unleſs the lands, for the accumulate ſum, and annualrents thereof, theſe cannot be pleaded as a ground of compenſation; nor will they be the foundation of diligence, by poinding or arreſtment; nor will the accumulate ſum be ſuſtained as a ground for adjudging the debtor's ſeparate eſtate.

Replied for the purſuers, It cannot be pleaded, that a debt is extinguiſhed by leading an adjudication, where the creditor is neither in poſſeſſion, nor the legal expired; *Stair, p.* 400.; *act* 19. 1672. The law plainly ſuppoſes, that all manner of diligence, whether perſonal

or

or real, is competent to an adjudger who has not attained poſſeſſion of the lands, without diſtinction whether the legal is expired or not; and when diligence can be uſed upon the debt, it is impoſſible to deny that the debt is ſtill ſubſiſting.

" The Lords found, That General *Wade*'s diſpoſition libelled on, does " carry the debts that were due to him by the *York-building* com- " pany, as well thoſe ſecured by the adjudications, charter, and " infeftments, as thoſe that were not." P. M.

Act. *Ferguſon.* Alt. *Hamilton-Gordon.* Reporter, *Shewalton.* Clerk, *Home.*

N° CCLVIII. 11th *December* 1760.

JOHN GRIEVE, ſervant to Dr *George Grieve* phyſician in *Peebles*,

AGAINST

JOHN WILLIAMSON Cordiner in *Peebles.*

A diſpoſition being granted to one, and the heirs-male of his body, will a charter granted by the ſuperior, without reſignation, confirming the diſpoſition to the diſponee in liferent, and to his ſon in fee, with infeftment following thereon, conſtitute the ſon fiar?

James Williamſon of *Cardrona*, by diſpoſition, *anno* 1706, for love and favour, and other cauſes, diſponed to Mr *John Williamſon* ſchool-maſter in *Peebles*, and the heirs-male of his body, or the heirs-male of the deſcendents of his body, which failing, to return to the granter's heirs, certain burgage-tenements in the borough of *Peebles*, and five acres of land in its neighbourhood, holding feu of the Earl of *Traquair.*

Theſe five acres were neither reſigned in terms of the procuratory, nor was infeftment taken in virtue of the precept of ſeiſin; but in 1709 a charter was granted by the Earl of *Traquair*, the ſuperior, which confirms the diſpoſition by *Cardrona*, *in omnibus capitibus et ſingulis clauſulis*, &c. *ſecundum formam et tenorem ejus in omnibus punctis.* At the ſame time, this confirmation is not granted to Mr *John Williamſon* as ſole fiar, in terms of *Cardrona*'s conveyance, but thus: *Prædict. Magiſtro Joanni Williamſon, in vitali reditu, et Jacobo Williamſon ejus filio, in feodo.* Immediately after this, there is a clauſe of *Novodamus* in the ſame terms; and the charter concludes with a precept of ſeiſin, for infefting the father in liferent, and the ſon in fee.

Upon this charter, infeftment ſoon followed; and the ſeiſin bears delivery to have been made to the father and ſon perſonally; and that the father, *pro ſemet ipſo, et in nomine ejus filii, inſtrumentum petiit*, &c.

From this time, down to the 1735, Mr *John Williamſon* the father continued to poſſeſs as fiar; and, in that character, granted infeftments of annualrent out of the lands. But the eldeſt ſon, *James*, having then died, *John Grieve*, one of his perſonal creditors, brought a proceſs againſt *John*, the ſecond ſon, as lawfully charged to enter heir to his deceaſed brother; and, upon *John*'s renunciation, obtained a decreet

cognitionis cauſa, of date the 9th of *January* 1736; and thereafter proceeded to lead an adjudication.

Upon this, Mr *John Williamſon*, the father, executed a diſpoſition in favour of his ſon *John*, reſerving his own liferent, and containing a ſubſtitution and return, in conformity with *Cardrona*'s diſpoſition, and aſſigning him to the unexecuted procuratory, and precept therein contained: but ſoon thereafter, he was himſelf infeft upon the ſaid precept, and appeared for his intereſt in the proceſs of adjudication brought by *John Grieve*; in which a decreet was obtained upon the 13th *July* 1736, reſerving all defences *contra executionem*.

Immediately after this, Mr *John Williamſon* the father brought a proceſs of reduction againſt the Earl of *Traquair*, of the above-mentioned charter and ſeiſin, on account of their being diſconform to *Cardrona*'s diſpoſition; and accordingly obtained a decreet, reducing the ſame, upon the 18th of *January* 1737.

Mr *Williamſon* having died a few years thereafter, he was ſucceeded by his ſon *John*; who continued in the undiſturbed poſſeſſion for a conſiderable time; but, at laſt, was called as a defender, alongſt with his tenants, in a proceſs of mails and duties, brought at the inſtance of the above-named *John Grieve*, upon the decreet of adjudication obtained in the year 1736.

The defender produced *Cardrona's* diſpoſition, and his father's infeftment, the diſpoſition by his father to himſelf, and the decreet of reduction, obtained againſt the Earl of *Traquair*; and *contended*, That theſe were ſufficient to exclude the purſuer.

Anſwered for the purſuer, 1*mo*, The decreet of reduction obtained againſt the Earl of *Traquair*, who was the only defender called, can have no operation to the prejudice of any other perſon; and, of conſequence, cannot affect the right that ſtood in *James Williamſon*, or cut off the intereſt of his creditors, or any claiming under him.

2*do*, As *James Williamſon* ſtood upon record infeft in the fee, the purſuer was *in bona fide* to contract with him; and therefore cannot be injured by any ſubſequent reduction of his right. And a ſimilar judgment was pronounced by the court, in the caſe of Mrs *Stewart* of *Phiſgil*, whoſe infeftment was ſuſtained, although her huſband's right to the lands was ſet aſide.

3*tio*, The charter by the Earl of *Traquair* was ſufficient, although it had contained no clauſe of *Novodamus*, to veſt the fee in *James*, by confirmation; ſeeing that, by the terms of *Cardrona*'s diſpoſition, no more than a liferent ſeems to have been intended to be given to the father.

4*to*, The clauſe of *Novodamus* in the charter, with the ſeiſin following upon it, made a proper and legal feudal inveſtiture of the property in *James*.

5*to*, Suppoſing the charter liable to objection, as being diſconform to the diſpoſition, ſuch objection was only competent to *John Williamſon* the father; and as he homologated the alteration, by accepting of the charter, and by taking it *propriis manibus*, which ſupplied the want of a reſignation, he could not afterwards retract. It was in his power to veſt the property in his ſon in this manner; and as he actually did ſo, he could not thereafter take the fee from him, or out of his *hereditas jacens*, either by a new infeftment in his own favour, or by a diſpoſition to his ſon *John*. And ſo in effect it was found in the caſe of

Cubbiſon

Cubbiſon of *Blackcraig* and *Cubbiſon* of *Cullenoch*. There a father having received a diſpoſition to himſelf, his heirs and aſſignees, with a precept of ſeiſin; and having afterwards taken a charter from the ſuperior, who was alſo the diſponer of the lands, to himſelf in liferent, and his ſon in fee, thought proper to bring a reduction of the ſame, as being granted without any warrant. But it having been urged for the ſon, That in the ſeiſin, the father was ſaid to have received the ſymbols of infeftment as attorney for his ſon, and that in a bond granted by the father, the ſon was deſigned by the lands contained in the charter, the Lords found, That the charter and ſeiſin, without any warrant, joined with the circumſtances above mentioned, were ſufficient to eſtabliſh the fee in the ſon.

Replied for the defender. To the *firſt:* The Earl of *Traquair*, who granted the erroneous charter, was the only perſon who could properly be called in the reduction. For *James Williamſon* having died without iſſue, the defender was his immediate repreſentative; but he had before that time renounced to be heir to him, in the purſuer's proceſs of conſtitution.

To the *ſecond: Reſoluto jure dantis, reſolvitur jus accipientis. James Williamſon* could communicate no better right to another than he had himſelf. And the caſe of *Phiſgil* is by no means applicable to the preſent. *Phiſgil* was not only infeft, but in the unchallenged poſſeſſion of the eſtate: when his lady was infeft in ſecurity of her jointure, ſhe contracted upon the faith of his being proprietor of the eſtate of which ſhe ſaw him poſſeſſed; and her infeftment created a real lien upon the lands for the moſt onerous cauſe. Onthe other hand, *James Williamſon* never was in the poſſeſſion, and the purſuer received no infeftment or real ſecurity from him. He was only a perſonal creditor; and his adjudication of the lands, as *in hereditate jacente* of *James*, could give him no right to them, in the event of its appearing that *James* had no intereſt in them himſelf.

To the *third:* The diſpoſition by *Cardrona* was granted to *John Williamſon*, and the heirs-male of his body, without mention of liferent or fee in the one or the other: and no inſtance can be given, where ſuch a grant was ever found to deviſe the fee to the iſſue of the diſponee, and only the liferent to himſelf.

To the *fourth:* The clauſe of *Novodamus* is an intrinſic nullity of the right, as being altogether without warrant. A ſuperior may, indeed, enlarge the right of the vaſſal by a new grant; but it never has hitherto been alledged, that by an arbitrary act, he could deprive his vaſſal of what was formerly conferred upon him, and transfer it to another. Suppoſing that reſignation had been made by *Cardrona*, in the terms of his diſpoſition, it could not be maintained, that the ſuperior could have given the new inveſtiture in different terms. But here the caſe is ſtill ſtronger: for no reſignation was made at all; and the ſuperior took it upon him to give away the property of lands over which he had no power, the fee being full at the time.

To the *fifth:* In the *firſt* place, There is no legal evidence of any homologation on the part of the father. His acceptance of the charter is no otherwiſe inſtructed than by the inſtrument of ſeiſin, which bears his receiving infeftment for himſelf and ſon. But this is only the aſſertion of of a notary: and the inconveniencies would be great, if the bare

bare atteſtations of notaries, produced at diſtant periods, were to be concluſive as to the intereſt of parties in land-rights. Beſides, it is not denied, that the father, from the date of the charter down to his ſon's death, acted not as a naked liferenter, but as abſolute fiar of the ſubject; which ſhows, that he did not conſider it as giving his ſon more than a *ſpes ſucceſſionis*; and he no ſooner diſcovered the contrary, than he gave the ſtrongeſt teſtimony of his repudiating theſe erroneous rights, by taking a new infeftment on the precept in *Cardrona*'s diſpoſition, and obtaining a decreet of reduction of the charter and ſeiſin.

In the *next* place, Even ſuppoſing the father's acceptance of the charter fully inſtructed, no right could thereby be veſted either in his or his ſon's perſon. —— The fee at that time was completely eſtabliſhed in *Cardrona*. He had indeed granted a procuratory and a precept. The procuratory, however, never was executed; conſequently Lord *Traquair* could grant no charter of reſignation, nor convey the fee to any perſon whatever by a clauſe of *Novodamus*. Again, no infeftment had been taken upon the precept; ſo the charter of confirmation was premature and inept. But even ſuppoſing infeftment had at that time been taken in virtue of the precept, the confirmation could be warranted no farther, than in ſo far as it was agreeable to the preciſe terms of ſuch infeftment; and as it deviated from *Cardrona*'s diſpoſition, by giving the fee to the ſon in place of the father, it was *ultra vires* of the ſuperior; and therefore void and null.

Laſtly, The caſe of *Cubbiſon* will by no means apply. For, 1*mo*, In that caſe, the real right of the lands was truly in the ſuperior's perſon, at the time of granting the charter. 2*do*, The circumſtance of the bond ſhewed the father's homologation of it in a ſtrong manner. And, 3*tio*, The preſumption ariſing from the notary's aſſertion, was confirmed into the moſt poſitive evidence, by the father's admiſſion of the fact.

" The Lords ſuſtained the defence, and aſſoilzied from the mails " and duties." I. C.

Act. *Macintoſh*. Alt. *Rae*. Reporter, Juſtice-Clerk.

N° CCLIX. 16th *December* 1760.

PERSONAL CREDITORS of BROWN of *Cairnton*,

AGAINST

GORDON.

Adjudication reduced on account of a pluris petitio.

IN the ranking of the creditors of *Cairnton*, the following intereſts were produced: 1*mo*, An adjudication led by *Gordon*. 2*do*, A number of perſonal creditors gave in their claims, none of them conſtituted by adjudication.

Objected for the perſonal creditors to *Gordon*'s adjudication, Mr *Gordon* has adjudged for *L.* 463 *Scots* more than is due; and conſequently the

the adjudication muſt be null and void. In ſome inſtances, indeed, notwithſtanding a *pluris petitio*, adjudications have been ſuſtained as a ſecurity for the ſums juſtly due. But this has only been found in the following caſes: 1*mo*, Where the queſtion has occurred between the creditor and the debtor himſelf; becauſe he ought to have appeared, and objected to the adjudication. 2*do*, Where the partial payments for which credit has not been given, were not made to the adjudger himſelf, but to his predeceſſor, and of which he might have been ignorant. 3*tio*, Where, if the adjudication be annulled, the effect would be, to give the other creditors a preference, and to cut the adjudger entirely out of his payment. The preſent caſe is very different. There is no excuſe for the *pluris petitio*; it conſiſts almoſt entirely in omitting to give credit for the contents of three receipts granted by Mr *Gordon* the adjudger, for money paid to himſelf. The objection is inſiſted upon, not by the debtor himſelf, but by his creditors; not with a view to forfeit Mr *Gordon* entirely of his debt, but to prevent him from excluding them; and the only effect of annulling the adjudication will be, to bring in the perſonal creditors *pari paſſu* with the adjudger.

Anſwered for *Gordon*, That though it may be juſt, that he ſhould be deprived of the penalties and accumulations of his adjudication, on account of the *pluris petitio*, it would be unjuſt to forfeit him entirely of the preference he had eſtabliſhed to himſelf by his diligence, becauſe he had adjudged for a little more than was due, without any deſign. Of old, indeed, the practice was to annul adjudications for the ſmalleſt *pluris petitio*: but of late that rigour has been ſoftened, and adjudications in ſuch caſes are reſtricted to ſecurities. —— It is true, that if the adjudication is annulled, the adjudger will not loſe his whole debt by the *pari paſſu* preference; but it is certain that he will loſe a conſiderable part of it.

There is no evidence, that the preſent overcharge was made by deſign or by fraud. Fraud is never to be preſumed; and accordingly, in ſeveral caſes, adjudications have been ſuſtained as ſecurities, though the *pluris petitio* was greater than in the preſent caſe; becauſe there was no evidence of fraud; 22d *December* 1722, *Henderſon contra Graham*; 3d *July* 1739, creditors of *Cuningham contra Montgomery*.

There could not be a ſtronger *pluris petitio*, than what was uſual in general adjudications led ſoon after the act 1672, by which the creditor adjudged, not only for principal ſum, annualrent, and penalty, but alſo for a fifth part more. In ſuch caſes, however, the adjudications were only in uſe to be reſtricted to ſecurities, till by the act of ſederunt 26th *February* 1684, the court declared, that they would annul them *in totum*.

" The Lords reduced the decreet of adjudication *in totum*." P. M.

Act. *Scrymgeour*. Alt. *Burnet*. Clerk, *Juſtice*.

N°CCLX. 17th *December* 1760.

MACDOUAL of *Glen*,

AGAINST

MACDOUAL of *Logan*.

Clauſe obliging the heritor to repay to the tenant, at the end of the tack, what ſums he ſhall lay out in building fences, is effectual, although the tenant purchaſe the lands during the currency of the tack.

Johnſton of *Kelton*, in 1727, ſet a tack of the lands of *Whiteſide*, *&c.* to *Macdoual* of *Glen*, for twenty-ſix years. The tack contained a clauſe, by which Mr *Johnſton* bound himſelf, and his heirs, to repay to the tenant and his heirs, whatever ſums he or they ſhould lay out in building and making profitable dikes and fences upon the lands, not exceeding the ſum of *L.* 50 *Sterling*, and that at the end of the tack; the ſaid expences to be vouched by the ſaid *John Macdoual* and his foreſaids their honeſt word allenarly.

In conſequence of this clauſe, *Macdoual* built a number of dikes, to the extent of about ſixteen hundred roods, which were all completed in the year 1730.

In 1731, Mr *Johnſton* ſold the lands, and *Macdoual* of *Glen*, the tenant, became purchaſer. The term when the tack expired was at *Whitſunday* 1754; and, ſoon thereafter, *Macdoual* of *Glen* brought a proceſs againſt *Macdoual* of *Logan*, as repreſenting *Johnſton* of *Kelton*, for payment of *L.* 50 *Sterling* laid out upon incloſing, agreeable to the clauſe in the tack.

Pleaded for the defender, Theſe expences were to be repaid at the expiry of the tack by the proprietor; becauſe he was to reap the benefit. The purſuer is now heritor, and enjoys the advantage of the fences; and therefore muſt pay for them. By a part of this clauſe, the tenant is obliged to leave the fences in a good condition. It is evident, therefore, that this money was to be paid, in conſideration of the advantage that would accrue to the heritor, by having the lands raiſed when the tack was at an end. This advantage is now fallen to the purſuer himſelf; and therefore he muſt pay for it. Had any third party become purchaſer, he, and not the defender, would have been liable to implement this clauſe. The tack was certainly at an end at the time of the purchaſe; and therefore, if the money was ever due, it was at that period. At that time the purſuer was aſſembling all the claims he had to exhauſt the price, and yet he made no demand for this *L.* 50, which demonſtrates, that he was ſenſible he had no title to it.

Anſwered for the purſuer, *Johnſton* of *Kelton* himſelf, his heirs, executors, and ſucceſſors, are bound by this clauſe in the tack; and it could never tranſmit againſt a purchaſer, without a ſpecial proviſo for that purpoſe. The purchaſer, no doubt, enjoys the advantage of the dikes; but then he pays for it, by buying the lands at a dearer rate; as

it

it will be admitted, that lands incloſed will give a greater number of years purchaſe, than thoſe remaining unincloſed: and as the ſeller gets a higher price on account of ſuch incloſures, he muſt undoubtedly pay the expence of making them. This is a perſonal debt of the ſeller, for which the purchaſer never can be liable. The *L.* 50 in queſtion was not payable till the years of the tack were run; and therefore it was impoſſible for the purſuer to make the demand at the time he was accounting for the price.

" The Lords found the defender liable to the purſuer in the *L.* 50 " in queſtion."

P. M.

Act. *D. Dalrymple junior, Miller.* Alt. *Garden.* Reporter, *Strichen.* Clerk, *Kirkpatrick.*

N° CCLXI. 17th *December* 1760.

WALKER and HERD,

AGAINST

THOMSONS.

Powers of the juſtices, &c. as to the time of calling out perſons to perform ſtatute-work on the highways for the three days before harveſt.

THE juſtices of peace and commiſſioners of ſupply of the county of *Kincardine* had divided the county into diſtricts in the year 1755, allotting the work for the inhabitants of each diſtrict to the roads within it; and they permitted a certain compoſition to be taken in lieu of the ſtatute-work.

At a general meeting in *May* 1757, they continued the ſame diviſion of the county into diſtricts, and fixed the compoſition-money to 1 *s. Sterling* for the annual labour of a man, providing the ſame was paid againſt the 15th of *June*; otherwiſe the whole ſix days labour was appointed to be exacted.

In conſequence of this reſolution, the committee on the road from *Stonehaven* to the bridge of *Dee*, cauſed notice to be given, in the church of *Dunnotter*, on the 29th *May* 1757, That perſons liable in ſtatute-work ſhould pay in to their clerk, before the 15th of *June*, the compoſition aforeſaid; " with certification, That if they failed, their ſtatute-" ſervice for ſix days that year would be exacted to the utmoſt." —— Another notification was made, on *Sunday* the 14th of *Auguſt*, That the deficients ſhould come out, and work at the highway, on the 15th, 16th, and 17th days of that month, or elſe to pay in their reſpective compoſitions. —— Numbers of people in the diſtrict accordingly paid the compoſition required; but a good many neither wrought nor paid. —— And on the 13th *September*, upon an application by the collector of the diſtrict to the defenders, as being three of the juſtices of peace and commiſſioners of ſupply, they granted a warrant for poinding the deficients in the pariſh of *Dunnotter*, conform to a particular liſt, and atteſtation thereto ſubjoined, to the extent of 1 *s.* 6 *d.* for each of the three days abſence from the ſtatute-work, preceding harveſt 1757. ——

And

And notice was given to all the deficients, before any execution was ordered.

Alexander Walker tenant in *Acquhirie*, and *Peter Herd*, his herdſman and cottar, were in the liſt of deficients.

This warrant having been afterwards put in execution, by poinding *Walker*'s effects, to the amount of 1 *s.* 6 *d.* for each of the three days he and three ſervants were abſent, and alſo by poinding *Herd*'s effects for his three days abſence, they brought an action for reſtitution of the goods poinded, and damages and expences, againſt the juſtices who ſigned the warrant, and the conſtable who executed it, on theſe grounds: 1*ſt*, In point of fact, That the purſuers were called out in the time of harveſt, which was a time excepted in all the *Scots* acts, reſpecting the reparation of highways. And, 2*dly*, In point of law, That the periods for calling out the inhabitants to perform the ſtatute-work at the highways was repealed by the act *anno* 5*to Geo.* I. and the period limited to the ſpring half-year, to be before the laſt day of *June*; which not having been obſerved by the juſtices, the poinding was clearly illegal.

Pleaded for the juſtices, That by the *Scots* acts of parliament, it is lawful to call out the inhabitants of the country to perform the ſtatute-work at any time in the year, ſeed-time and harveſt excepted: That the 15th, 16th, and 17th days of *Auguſt*, upon which the purſuers were called out to work, did not fall within the harveſt of that part of the country; and particularly, that Mr *Walker* had then no harveſt, other than that, of purpoſe to afford an excuſe, he had cut ſome green bear.——And it was much inſiſted on, That this purſuer had all along manifeſted the moſt unjuſtifiable intention of oppoſing every ſcheme that could be ſuggeſted by the juſtices or commiſſioners for repairing the highways of the county. —— The poinding did therefore lawfully proceed; for that the direction of the *Britiſh* ſtatute, relative to the calling out the people to work, ought to be underſtood as ſpecially applicable to the year 1719, in which the ſtatute was made, as it does not in expreſs terms direct, that in all ſucceeding years they ſhould *only* be called out before the end of *June*, or diſcharge the calling them out after the cloſe of that month; and not as a repeal of the *Scots* acts.

Notwithſtanding this ſtatute, the juſtices and commiſſioners, through moſt, if not all parts of *Scotland*, have conſidered the act 1670 as in full force, and have accordingly adhered thereto, by calling out the people at ſuch times as were found moſt convenient for them, either before or after the end of *June*, ſeed time and harveſt only excepted.—Long and univerſal cuſtom, in oppoſition to a ſtatute, will annul it; *à fortiori* muſt it ſerve to explain the meaning of a doubful law. —— The words of the ſtatute in queſtion do not clearly fix the point; and therefore the ſenſe of the country, and deciſions of this court, may give it that explanation that is moſt conducive to the public utility.—If the time of calling out the country-people to the roads for the ſpring ſeaſon, is limited to the end of *June*, the good purpoſes of the law will be in a great meaſure defeated; as the ſummer's work is that on which the chief dependence can be had, and the people, as ſoon as the bear-ſeed is over, which is ſcarce before the end of *June*, fall to caſting their peats, and then to the cutting their hay, which commonly employ them till the end of *July*; ſo that the beginning of *Auguſt*, before the harveſt comes

comes on, is as convenient a time for calling them out as any in the year.

Suppoſing the regulation of the act 1670, as to the time of calling out the people to work, to be repealed by the *Britiſh* ſtatute, the poinding complained of was regular on a ſeparate footing.——The juſtices of peace and commiſſioners of ſupply, by another branch of the act 1670, which ſtands unrepealed, have a diſcretionary power, of exacting either the labour, or the compoſition ſubſtituted in place thereof; and a publication having been made in *May*, of the intention of taking the compoſition, the poinding did lawfully proceed againſt the purſuers, as they neither paid the compoſition, nor offered to work within the time limited, when ſuch work unqueſtionably might have been exacted; whereby the purſuers did ſubject themſelves to execution for the penalty impoſed by law on deficients: And the ſubſequent advertiſement calling them out to work was made *ex ſuperabundanti.*——And, after all, the poinding would have been ſtopped, had Mr *Walker* thought fit to pay the trifle required of him; as the juſtices gave order, when they granted the warrant, that on payment of the compoſition of 1 *s.* for the whole year's ſtatute-work, the poinding ſhould be ſtopped.——Nor was there any particular deſign to diſtreſs Mr *Walker*. The warrant was directed in general, againſt him, and about a hundred more, although he, and *Herd*, who ſtood out through his influence, only were poinded, as all the others who were able, prevented the execution by payment.

In the *laſt* place, Suppoſing the poinding had been irregular, the defenders cannot be ſubjected to damages. There is a wide difference between ſuch actings as void a poinding, ſo as to intitle the party to reſtitution of the goods, and thoſe that, beſide reſtitution, ſubject the poinders to damages and expences. The leaſt inaccuracy, in point of form, may produce the firſt effect; but there muſt be a *mala fides* to occaſion the latter. The defenders acted *optima fide* for the public good, and with an apprehenſion of law, founded on the univerſal practice of the country. Should that apprehenſion be now found wrong, it could not juſtly operate *retro*, ſo as to puniſh them as if they had acted contrary to known and certain law.—If any wrong was done, the officer only who applied for the warrant is accountable for it.——The defenders ſigned the order, in the capacity of judges ſpecially impowered by ſtatute, and not as parties; and therefore the officer who obtains the warrant, like a creditor who obtains undue diligence, ought only to be anſwerable for it.

Pleaded for the purſuers, Mr *Walker* does not merit the character given him, of a ſeditious tribune, and a violent obſtructor of that uſeful work, the repairing of the high-roads; unleſs the maintaining the laws of his country is to be conſtructed *ſedition*; or a high deſire to have the roads repaired in the manner moſt effectual, and agreeable to law, and having done more in repairing of them than any other perſon of his circumſtances in the country, is to be held as *oppoſition* to ſo good a work.——He has indeed been always averſe to the paying of compoſitions in place of the ſtatute-work, as being often unequally diſtributed, in the application, of which, of late, he has had ſolid experience, and that the work might be more haſtily, and to greater purpoſe, done by the labour of the inhabitants required of them by law.

And as he underſtood the calling him out in the time of his harveſt, to have been done with an intention of forcing him to pay a compoſition, ſo he flatly refuſed on this occaſion either to do the one or pay the other.

The defenders are groſsly miſtaken both in the fact and in their interpretation of the law. For, as to the *firſt*, The purſuers are in a condition to prove, if it ſhall be thought neceſſary, that harveſt was, in the year 1757, begun in that part of the country where they reſide before the 15th *Auguſt*; and particularly that Mr *Walker* did begin his harveſt on the 6th *Auguſt*, and had moſt of his bear cut down before the expiry of the days in which he was called out to work; not unripe bear, but in a ſtate of maturity.——And, with reſpect to the *ſecond*, There can be nothing more clear, than that by the enactment of the *Britiſh* ſtatute, an univerſal regulation is eſtabliſhed as to the not calling out the inhabitants to the performance of the ſtatute-work for the ſpring half-year after the month of *June*.——The ſtatute provides, That the inhabitants ſhall be called out before the end of *June*, in the year 1719, and then follow theſe words; "and ſo yearly, and every year, until the "ſaid highways are ſufficiently repaired."—— Here there is an effectual regulation, to take effect in all time thereafter. And as it is provided by the firſt clauſe of the ſtatute, that the *Scots* acts ſhall only be in force, in ſo far as not altered or repealed by that ſtatute; ſo it follows of conſequence, that the general regulation eſtabliſhed by the ſtatute is a direct alteration of the law of *Scotland*, ſo far as reſpects the time of calling out the inhabitants to perform the ſtatute-work.

Although expediency cannot be liſtened to againſt the poſitive enactment of ſtatute, yet even here the defenders ſeem to be greatly miſtaken, in arguing, that there would not be a ſufficient time between the ſeed-time and the end of *June*, for calling out the inhabitants to work. ——The purſuers have no occaſion to impugn the defenders argument upon the force of cuſtom againſt the ſtatute, becauſe of its having been laid upon a wrong hypotheſis. For it is well known, that the *Britiſh* ſtatute is in obſervance, in all its parts, through the whole country; and theſe very defenders have ſo far paid a perfect regard to it, as to levy the penalties as directed by that ſtatute, which are different from thoſe in the *Scots* ſtatutes, but not more expreſsly altered by the *Britiſh* ſtatute than the time is of calling out the people to work.

Both the words of the ſtatute 1670, and of the intimation for payment of the compoſition, deſtroy the argument founded upon them. By the act 1670, it is only made lawful to diſpenſe with the work of thoſe perſons who live at a great diſtance, and to accept of a compoſition from them. But this diſpenſing power, in favour of the inhabitants who are ſo circumſtanced, can never veſt a power in the juſtices of forcing payment of the compoſition, when the favour of the law is not aſked of them, and the inhabitants are willing to perform their work, if called out as the law requires.——The certification annexed to their intimation for payment of the compoſition, That who fails to pay, will be called out to the performance of the labour, ſhows they were ſenſible of this being the proper conſtruction of the law. And accordingly thereafter, upon the not-payment, the juſtices did not think of poinding, but did make an intimation for calling out the inhabitants to work; and which, if it had been done agreeable to law, would have

ſufficiently

ſufficiently juſtified the ſubſequent poinding. —— Further, the juſtices, in this caſe, have not made the act 1670 the rule of their conduct. For by that ſtatute, where perſons are called out at too great a diſtance, they are only to pay a compoſition of 6 *s. Scots* yearly for each man; whereas the compoſition ordered by the juſtices of peace and commiſſioners of ſupply was at the rate of 12 *s. Scots* for each man. —— Nor was there any offer made to Mr *Walker* to ſtop the poinding, upon receiving payment of the compoſition-money. —— He had fallen under the diſpleaſure of theſe three juſtices upon other accounts; no favour was to be ſhown to him; inſomuch that, although the practice, as to many, had been only to poind for the compoſition-money, yet he was to be poinded to the very rigour of the law, not only for the abſence of his ſervants, but for himſelf, although it is well known, that he is not able to labour himſelf, and that he is one of a committee for directing the repairing, and an overſeer in another pariſh; and therefore had always been diſpenſed with from working in any other place.

In matters of ſpuilzie, the diſtinction of *bona* and *mala fides* may ſometimes take place, and the circumſtances may be ſuch, as in one caſe to induce the court to give damages, and in another to refuſe them. —— But in all caſes where a ſpuilzie is committed by an unlawful poinding of goods, not only the goods themſelves are to be reſtored, but the proſecutor is to be indemnified of the expence incurred in obtaining his redreſs.

The overſeer, againſt whom the defenders contend this action ought to have been directed, is not the creditor in the ſtatute-work. Nor do the juſtices, in that matter, properly act in a judicative capacity. The overſeer is the ſervant of the juſtices, and they act in a miniſterial capacity, having miniſterial powers veſted in them, for forcing the inhabitants out to work as the law directs, or levying penalties in place thereof, to be by them applied in place of the work: ſo they are properly the creditors. And there is nothing better known, than that in all ſuch actions, of which there have been ſeveral late inſtances, the juſtices are only called as defenders who ſign the warrants. —— And as to the ſuppoſed ignorance of the juſtices, founded upon the practice of the country, the ſtatute of the 5th of the late King is *in viridi obſervantia* over the whole country. 2*do*, Two of the juſtices are advocates in *Aberdeen*, in the practice of the law; and therefore are preſumed to know it. 3*tio*, By a letter wrote to them by Mr *Walker*, immediately after ſigning the warrant for poinding, they were put upon their guard, of their having done an illegal thing, and that complaint would be made of it, if the poinding ſhould be executed. And, *laſtly*, They appeared to have had in their hands, or to be in the knowledge of the ſtatute of the 5th of the late King, as they grant their warrant for levying the fines agreeable to the direction of that ſtatute. Further, it appears, that at executing the poinding, the officers had an intimation made to them, before witneſſes, of their being executing a warrant which had been granted contrary to law.

" The Lords found, That the act of parliament 5*to Geo.* I. does ſo far " repeal the former acts, as to limit the time for calling out peo- " ple liable to work before harveſt, that it ſhould be before the " end of *June:* And as the purſuers, in this caſe, were warned " to work at the highways in *Auguſt*, found the warrant granted for " poinding

" poinding their effects for not-compliance, and the poinding " thereupon, was irregular; and therefore found the defenders liable " to the purſuers in reſtitution of the goods libelled, and expences " of proceſs." D. R.

Act. *Montgomery.* Alt. *Rae.* Reporter, *Colſton.*

N° CCLXII. 18th *December* 1760.

COATTS and COMPANY,

AGAINST

NISBET.

Recourſe ſuſtained upon a promiſſory note, where the diſhonour was duly notified, although the note itſelf and proteſt were not immediately returned.

David Leitch, upon the 27th of *April* 1758, granted a promiſſory note, dated at *Glaſgow*, in the following terms. " Sixty days af- " ter date, I promiſe to pay to the order of Mr *David Nisbet*, *L.* 55 " *Sterling*, at the houſe of Mr *Malcolm Hamilton and Company*, mer- " chants in *London*, for value received."

Nisbet indorſed this note to *Coatts and Company*; they indorſed it to *Moſes* ironmonger of *Birmingham*, and he to Meſſ. *Parkingſons* merchants in *London*.

When the note became due, it was preſented for payment at *London*; and upon refuſal, was duly proteſted againſt *David Leitch*, and all others concerned. It was admitted, that the diſhonour was notified in due time to Mr *Nisbet*. The note and proteſt being returned, Meſſ. *Coatts* brought a proceſs againſt Mr *Nisbet* for payment.

Pleaded for the defender, Though the diſhonour of the note was properly notified, yet the note itſelf, and the proteſt, were not tranſmitted to *Scotland*, or preſented to the defender for payment, till a month after the date of the proteſt: That in all ſuch caſes, not only muſt the diſhonour of the bill be timeouſly intimated to the indorſer, but the bill itſelf muſt be immediately tranſmitted, and payment demanded; and that this is the opinion of merchants who have been conſulted upon the queſtion: That in the preſent caſe, *Leitch* was now become bankrupt; and, if the note had been timeouſly tranſmitted, payment might have been recovered from him.

Pleaded for the purſuer, As this note was payable in *England*, and paſſed by indorſation through ſeveral hands in that country, it muſt be regulated by the law of *England*; and by the ſtatute *9no & 10mo Guliel. cap.* 17. joined with the act 3d and 4th of Queen *Anne, chap.* 9. it is ſufficient, that due notice be given of the diſhonour within fourteen days. Neither of theſe acts require, that the note itſelf, or proteſt, ſhould be tranſmitted within any limited time. Beſides, it is impoſſible, that the holder of the note can tranſmit the only document he has for the debt, until he has received payment.

" The

"The Lords found the defenders liable in payment of the contents of "the note, with expences." P. M.

Act. *Miller.* Alt. *Lockhart.* Clerk, *Home.*

N° CCLXIII. 18th *December* 1760.

MACCULLOCH of *Mulderg*,

AGAINST

ROSS of *Pitcalny*.

Additional proviſion to a daughter failing heirs-male of the granter's body, does not take place if the daughter dies before the heirs-male fail.

IN the year 1702, *James Macculloch*, then of *Mulderg*, having at that time two ſons, granted a bond of proviſion in favour of his daughter *Jean*, for 7000 merks, payable the firſt term after her marriage; and further, an additional proviſion, in the following words: "And failing "of heirs-male lawfully begotten of my body, I hereby bind and ob-"lige me and my foreſaids, to content and pay to the ſaid *Jean* my "daughter, the ſum of other 7000 merks, at the ſecond *Whitſunday* "or *Martinmas* after failing of my ſaid heirs-male," &c.

James Macculloch was ſucceeded by his ſon *David*; who lived till the 1755; and in him the heirs-male of the body of *James Macculloch* failed. *Jean* died before the year 1720. *Roſs* of *Pitcalny*, her ſon, adjudged the eſtate of *Mulderg*, for payment of this additional proviſion of 7000 merks, the heirs-male of the granter having now failed. *John Macculloch* of *Mulderg* brought a reduction of this adjudication.

Pleaded for the purſuer, From the general tenor of this bond, it is evident, that the proviſion was intended by the granter to be paid to his daughter, only in the event of her living till the exiſtence of the condition at which it is declared to take place. The proviſion of the firſt 7000 merks was only to take place in the event of her marriage; ſo that if ſhe died unmarried, it could not be a burden upon the family. The ſame is the caſe with regard to this additional proviſion.

The condition of the failure of heirs-male of the granter's body is made, not only to ſuſpend the payment, but even the obligation itſelf. It is only upon their failure that he binds his heirs to pay this additional ſum. Till that happens, there is no obligation; *dies nec cedit, nec venit.* The gift was merely perſonal to *Jean*; and as ſhe died before the failure of heirs-male, the additional proviſion falls to the ground. As it was never due to *Jean* herſelf, of conſequence it cannot tranſmit to her repreſentatives.

Pleaded for the defender, This additional proviſion was evidently intended to take place in the event that has happened. It was a *ſolatium* to the granter's daughter, in caſe the eſtate ſhould go to a collateral heir-male to her prejudice. The intention of it is declared to be, to procure her a ſuitable marriage; and therefore ſhe certainly had power to

assign it in her contract of marriage; and consequently it must be due upon the existence of the condition. Though no mention is made of heirs in the bond, yet such provisions always go to heirs.

"The Lords sustained the reasons of reduction." P. M.

Act. *Ferguson.* Alt. *Hamilton Gordon.* Clerk, *Kirkpatrick.*

N° CCLXIV. 23d *December* 1760.

JOHN GRANT younger of *Rothmaise*, and ROBERT FLEMING, great-grandson of JOHN FLEMING of *Board*,

AGAINST

Lady CLEMENTINA FLEMING, and CHARLES ELPHINSTON, Esq; her husband.

Not competent, in a reduction-improbation, to allow a proof of possession, in order to found prescription upon titles produced, as sufficient to exclude, after acts had been extracted for the first and second terms.

UPon the 24th of *August* 1374, King *Robert* II. confirmed a charter granted by *Robert* Lord *Erskine*, to *Patrick Fleming*, of the lands of *Board*, and others, to be held *de Domino baroniæ de Lenzie, in feodo et hereditate.* These lands were possessed by *Patrick*'s descendents, and were, in 1583, disponed, by *John Fleming* of *Board*, to *John Fleming*, then younger of *Board*, his eldest son.

John Grant younger of *Rothmaise*, having got a trust-bond from *Robert Fleming*, great-grandson of the said *John Fleming* younger of *Board*, charged him to enter heir to his predecessors in these lands; and in the year 1741 obtained a decreet of adjudication; upon which title a process of reduction, improbation, and declarator, was brought against Lady *Clementina Fleming* and her husband, in order to set aside any claim they might pretend to the property.

In this process days were assigned to the defenders for satisfying the production, and acts for the first and second terms were extracted; but when certification was craved for not-production on the second act, they produced certain writs vesting the barony of *Lenzie* in the person of Lady *Clementina*; and *alledged*, That although the lands of *Board* were not particularly mentioned in these writs; yet as she and her predecessors had possessed them for more than forty years, as part of the barony of *Lenzie*, they had acquired right to them by the positive prescription; and had therefore produced sufficient to exclude the pursuers.

Objected by the pursuers, 1*mo*, It is not competent to a defender, in a process of this nature, to resort to the plea of an exclusive right, after the pursuer's title has been sustained, acts for the first and second terms extracted, and the time assigned for satisfying the production is elapsed. The taking a day to produce, imports a contract judicially entered into between the pursuer and defender, whereby the latter solemnly engages to produce the whole writs called for, or to allow them to

to be reduced as forged; and after both terms are elapſed, certification muſt be granted *contra non producta*.

2*do*, The writs produced are inſufficient, without a proof of poſſeſſion; whereas a production to exclude ſhould be ſufficient of itſelf, without the aid of parole-evidence, which ought not to be allowed until a full production is made.

3*tio*, Poſſeſſion for the years of preſcription upon the rights produced, would not eſtabliſh a title to the property of the lands in queſtion, excluſive of the purſuer's. For though the infeftment of the ſuperior, containing theſe lands, would be ſufficient againſt all others; yet it will not exclude the vaſſal; and before any preſcription can run againſt him, the ſuperior muſt ſhew ſome title by which the property might have been conſolidated with the ſuperiority. Could the defenders produce a diſpoſition, or a reſignation *ad remanentiam*, of theſe lands, even though granted by one who was not truly the vaſſal, preſcription might have taken place; but the grants of the ſuperiority, in which the lands fall to be narrated, will by no means afford any title for preſcription.

" The Lords found it incompetent to allow a proof of poſſeſſion, in " order to found preſcription, *in hoc ſtatu*." I. C.

Act. *Rae*. Alt. *Hamilton-Gordon*.

N. B. The three following caſes being omitted to be inſerted in their proper places, are here inſerted at the end of the year.

N° CCLXV. 15th *July* 1760.

HUGH CRAWFORD, truſtee for *David Smith* of *Methven*,

AGAINST

Mrs ANNE RANDAL of *Breck*.

In a challenge of a creditor's right affecting an eſtate, for behoof of the apparent heir to the original debtor, a decreet pronounced in a former challenge and competition, to which the purſuer's father, who then held the right of apparency, had been made a party, was held as a res judicata, *although it was contended, That he was not a party to the former proceedings, upon the footing of the right of apparency, which was not then known to him.*

Crawford, upon a truſt-bond granted by *Methven*, apparent heir of *Andrew Smith* of *Rotheſholm*, his granduncle, obtained an adjudication againſt him, as charged to enter heir in ſpecial in the lands of *Rotheſholm* and *Hurteſſo*; and then purſued an action of mails and duties againſt the tenants, and alſo againſt Mrs *Anne Randal*, as intromitter with the whole rents.

Randal produced her titles: 1*ſt*, A bond granted to *Michael Randal* of *Breck*, 26th *June* 1667, by Mr *Patrick Smith* Advocate, and *Andrew Smith* of *Rotheſholm*, conjunctly and ſeverally, for *L.* 1057 *Scots*. 2*dly*, Decreet of adjudication obtained by *Breck*, 12th *July* 1688, of the

the lands of *Rotheſholm* and *Hurteſſo*, for payment of the accumulate ſum of *L.* 2139, 14 *s. Scots.* 3*dly*, A decreet of reduction and improbation obtained by *Thomas Randal*, her brother, in 1740, againſt the preſent *Methven*'s father, and *Trail* of *Sabay*, *Hugh Smith*, and others.——On this laſt-mentioned decreet ſhe pleaded *res judicata*, and ſet forth,

That in the year 1728, a proceſs of reduction, improbation, and declarator, was brought, in name of *Robertſon* of *Tilliebelton*, adjudger upon a truſt-bond from *Hugh Smith*, who then aſſumed the character, and was conſidered as heir of line of the ſaid *Andrew Smith* of *Rotheſholm*, his granduncle, as well as of *John Smith* of *Huip*, his grandfather, againſt *David Trail* of *Sabay*, who, before the 1700, had got into poſſeſſion of the lands of *Rotheſholm*, *Hurteſſo*, and *Huip*, in virtue of ſundry grounds of debt owing by the ſaid *Andrew* and *John Smiths*, which he had purchaſed in from *David Smith* of *Methven*, father to *Methven* the preſent purſuer, and others; and alſo againſt the ſaid *David Smith* of *Methven*, and *William Randal*, father to the preſent defender. On the other hand, *Thomas Randal*, ſon to *William*, and diſponee to his debt on *Rotheſholm*, brought a counter action of reduction, improbation, and declarator, againſt the ſaid *Hugh Smith*, and *Trail* of *Sabay*, *Smith* of *Methven*, and others.——And theſe two proceſſes having been conjoined, Mr *Randal*'s adjudication and grounds of debt had repeatedly ſtood the teſt, after a moſt obſtinate litigation, firſt againſt the objections of *Hugh Smith*, as apparent heir of the debtor; and next, *Trail* of *Sabay* having taken the field againſt him, upon the footing of theſe adjudications, under which he had obtained, and was then in poſſeſſion both of the lands of *Rotheſholm* and *Hurteſſo*, and alſo of the lands of *Huip*; the Lords "found *Sabay*'s adjudications paid and extinguiſhed; and therefore preferred Mr *Randal* to the rents of the "ſaid lands of *Rotheſholm* and *Hurteſſo* for crop 1739, and in time "coming." And thereupon Mr *Randal* extracted his decreet; and, in virtue thereof, entered to the poſſeſſion of the lands of *Rotheſholm* and *Hurteſſo*, as his abſolute property; and continued in peaceable poſſeſſion till his death in 1755, when he was ſucceeded therein by the preſent defender, his ſiſter and ſole heir.——And for her it was now *contended*, in bar of this freſh attempt to wreſt the ſubject from her, by the preſent *Methven*, as having lately diſcovered and proved himſelf to be the true heir of line of *Andrew Smith* of *Rotheſholm*, (being grandſon to his elder brother of the full blood, whereas *Hugh Smith* was deſcended of his younger brother of the half blood), That the preſent *Methven*'s father having been called, and compearing, in the abovementioned proceſſes concluded in 1740, *Methven* or his truſtee cannot now be heard to make any further objection, or repeat the objections formerly urged, as theſe muſt be conſidered as either *proponed* and *repelled*, or *competent* and *omitted*; and that the decreet obtained by *Thomas Randal* muſt be held as a *res judicata* againſt *Methven*.

Anſwered, Although it is admitted, that the late *Methuen* was cited as a defender in the reduction and improbation raiſed at the inſtance of *Thomas Randal*, this decreet pronounced in favour of *Randal* could not ſtrike againſt or hurt the right of apparency, which was at that time in the perſon of *Methven*, although he was then ignorant of that right.——Reduction and improbation are terms which, when applied to deeds

or

or writings, are well underſtood, and can have a proper legal effect; but to reduce and improve a right of apparency, to declare it falſe and forged, *&c.* is a contradiction and abſurdity in the uſe of words. —— No ſuch inept purpoſe was, or could be, in view, by citing *Methven* in that reduction. Nor could it be thereby intended to exclude him from claiming that eſtate, at any time thereafter, in the character of apparent heir thereto; becauſe his right of apparency was not at that time known: on the contrary, another perſon was then competing with Mr *Randal* under that character, and was believed to have the right in his perſon.

The only reaſon that can poſſibly be aſſigned why *Methven* was called in that proceſs, appears to have been, becauſe he was thought to have an intereſt to defend the diligences led againſt the eſtate by *Sabay*, to whom he had conveyed certain grounds of debt affecting it, that were brought under challenge in that reduction, for which he was liable in warrandice to a certain extent.——This intereſt, however, appears in itſelf to have been very diſtant and trifling; and *Methven* does not ſeem to have given any attention to the proceedings in this proceſs, in which he imagined at that time he had ſo little concern. —— It is true, indeed, upon the diligence at *Sabay*'s inſtance being at laſt ſet aſide, *Sabay* having brought a proceſs of recourſe, *Methven* appeared to defend himſelf: and the proceſs was dropped; for this good reaſon, That as *Sabay*'s diligence had been ſet aſide, becauſe his debt had been ſatisfied and paid by intromiſſions, and not from any objection to his grounds of debt, no warrandice could poſſibly be incurred.—And the purſuer does not now inſiſt, that *Methven* is not bound by the deciſion which was given as to *Sabay*'s rights, and precluded from making any new objection, or renewing any further claim againſt the eſtate in virtue thereof.— But his plea reſts upon a very different and more ſolid foundation; and now that it is diſcovered, and clearly proved, that he is the undoubted heir of line in the lands, the purſuer, in his right, claims under that title the privilege which the law has given to every apparent heir, of challenging the incumbrances affecting the eſtate formerly belonging to his predeceſſor. —— This is a right, in its own nature, totally diſtinct from, and indeed inconſiſtent with that on account of which the late *Methven* is ſaid to have been called in the former proceſs, and which could, in no reſpect, be prejudged by any proceedings in that cauſe, ſeeing it is derived through a very different channel, and was not, nor could poſſibly be taken notice of in the queſtions then ſtirred.

Replied, That the protecting the ſubject againſt the vexation of frivolous ſuits, has been ever an object of particular attention.—— Hence it is an eſtabliſhed rule, That *res judicata* affords a total and abſolute defence; and alſo, That *competent* and *omitted* is relevant to debar a renewal of the ſame action, upon arguments that might have been formerly proponed.——A caſe can ſcarcely be figured, where there is more reaſon for applying theſe ſalutary rules than the preſent. —— The defender's predeceſſor called the father and predeceſſor of this purſuer, perſonally, in the moſt ſolemn proceſs known in our law, at a time when he held in his perſon the very ſame right under which his ſon now claims: And amongſt the warrants of the former proceſs, there has been found a *repreſentation* of Mr *Smith* of *Methven* to the Lord Ordi-

nary, ſetting forth, " That a proceſs had been raiſed againſt him upon " the warrandice in his conveyance to *Sabay*, and that proceſs having " been remitted to *Tillibelton*'s reduction and improbation, (which was " conjoined with Mr *Randal*'s), decreet was obtained againſt *Methven*, " againſt which he prays to be reponed." By which it is ſufficiently proved, that *Methven* was a party to thoſe proceſſes; and conſequently that nothing that paſſed therein can be ſuppoſed to have eſcaped his knowledge or obſervation. If he did not in his own name propone the objections which were repeatedly urged by other competitors, and are now again offered by his *ſon* and *heir*, it muſt be preſumed, that he wilfully ſtaid behind the curtain, with a view to an after-game, by attacking the winner, after he was fatigued and wearied out with defending againſt the ſame weapons in the hands of others.

Again, as moſt of *Sabay*'s rights had been derived from *Methven* himſelf, and he ſtood bound in *abſolute* warrandice of them, the litigation maintained by *Sabay* muſt be underſtood as the compearance and defence of *Methven*; and conſequently *Methven*, or his heir, cannot now be heard againſt the decreet then obtained by Mr *Randal*.

Further, *Methven* was called by the defender's predeceſſor to exhibit and declare any title whatever he then had in his perſon, whether it was that of *heir of line* to his debtor, or *adjudger* of his eſtate.——The purſuer of that action could not know how many titles he might have in his perſon, till he appeared, and declared them. —— It is ſufficient that *Methven* was properly called in, and perfectly knew of that proceſs; and as he at that very period held the ſame title of *heir* that his ſon now takes up, (as well as that of creditor), the intereſt of the then purſuer could not be hurt by his chuſing to defend under the one title rather than the other.——The purſuer had no compulſitor to oblige him to defend under both titles; and the conſequences would be very inconvenient, were a defender, poſſeſſed of ſundry titles, allowed to defend under *one*, and, when defeated, make a diſcovery of *others*, which he then ſtood veſted in, and commence a freſh litigation upon the very points already over-ruled. Beſides, it is evident, that the character of *heir* could never have added weight to the objections offered for *Methven*, or his aſſignee, to the defender's right. Such objections were rather ſtrengthened, when proponed under the character of a *co creditor*; and if over-ruled in that caſe, there could certainly be no hope of their being ſuſtained in favour of the objector, as *heir* of the common debtor.

Neither can the aſſertion of the preſent purſuer, " That his father " did not, during the former proceſſes, know that he was truly the " heir of line of *Rotheſholm*," alter the caſe. —— It is true, that *Hugh Smith*, when he raiſed the firſt proceſs of reduction and improbation, aſſumed that character, which it now appears belonged to *Methven*. But the defender's predeceſſor had no occaſion to know the true ſtate of the fact: Yet had he known it, what could he have done more than to have called *Methven* in ſuch a proceſs, that he might ſupport his title, if it was truly ſufficient? This he accordingly did.——And it might as well be required of every purſuer of an improbation, to enumerate every title the defenders are poſſeſſed of, (though he ſhould need the aid of inſpiration to know them), as the defender's predeceſſor to have called *Methven* under the ſpecial character of *heir* of *Rotheſholm*. —— *Methven* had

had then undoubtedly the ſame right of *heir* in his perſon that his ſon now has; and conſidering that he was the nephew of *Rotheſholm*, as well as of *Smith* of *Huip*, it is almoſt incredible, that he was ignorant of theſe brothers having been born of different marriages.—*In dubio*, the contrary muſt be preſumed; and taking the matter in that view, it was certainly incumbent upon him, to have put in his claim at a time when he ſaw another aſſume that title.

It muſt give great weight to the defender's arguments in ſupport of the former decreet as a *res judicata*, that after the purſuer was allowed by the Lord Ordinary to open his objections to the defender's rights, before anſwer as to the preliminary point, it appeared, that the whole of them were *identically* the ſame that had been argued and over-ruled in the former tedious litigation.—The purſuer then means nothing leſs at preſent, than to make the Lords overturn all that they formerly did upon the moſt mature deliberation, without having one word to ſay, that can throw any new light upon the matter.

"The Lords ſuſtained the defence of *res judicata*." D. R.

Act. G. Cokburne. *Alt. Rae.*

N° CCLXVI. 7th *Auguſt* 1760.

The YOUNGER CHILDREN of the deceaſed JAMES HENDERSON of *Grange* of *Barry*,

AGAINST

The CREDITORS of FRANCIS HENDERSON.

Reſerved faculty, to burden with a certain ſum, in a diſpoſition of lands by a father to his eldeſt ſon, being afterwards exerciſed by way of legacy to the younger children, theſe legatars were found to have no preference to the diſponee's other creditors, but intitled only to compete according to their diligence.

James Henderſon having purchaſed the lands of *Grange* of *Barry* from *David Brisbane*, diſponed the ſame, in 1738, to *Francis Henderſon*, his eldeſt ſon, in his contract of marriage; reſerving his own liferent, and a faculty to burden them, at any time in his life, *etiam in articulo mortis*, with the ſum of 8000 merks to any perſon or perſons he ſhould think fit.

James Henderſon, whoſe right was only perſonal at the time of his ſon's contract of marriage, did, in 1749, expede infeftment upon his author *David Brisbane*'s diſpoſition; but the ſon never was infeft.

In 1750, *James Henderſon* executed a teſtament, in which he legated and bequeathed to his three younger ſons the foreſaid ſum of 8000 merks, in virtue of the power reſerved in his eldeſt ſon's contract of marriage.

The father died in 1753; and *Francis* the eldeſt ſon having contracted ſeveral debts, his creditors adjudged his eſtate in the years 1752, 1753, and ſubſequent years; and one of them obtained a charter under

der the great ſeal in 1756, and was thereon infeft. —— The adjudications proceeded upon ſpecial charges to enter heir to the father, and adjudged alſo the diſpoſition by him to his ſon, and procuratory therein contained. — His younger brothers likewiſe obtained decreet againſt him in 1754, for payment of the 8000 merks in terms of the father's teſtament; and upon this decree they adjudged the lands of *Grange* of *Barry* in 1755.

In a ranking and ſale of the eſtate, the younger brothers *inſiſted* for a preference to the other creditors of *Francis*, upon the following grounds.

1*mo*, In common equity, the debts and deeds of a predeceſſor are intitled to be preferred to thoſe of the ſucceſſor. An heir naturally takes nothing by the death of a predeceſſor, but what remains over and above ſatisfying his debts and legacies; and the creditors of an heir ought to be in no better caſe than himſelf. This is agreeable to the *Roman* law, whereby a *ſeparatio bonorum* was allowed in caſe of the inſolvency of an heir, both to the creditors and legatars of the predeceſſor; *l. 6. pr. ff. De ſeparationibus.*

2*do*, The reſerved faculty of *James Henderſon* the father, after he was infeft upon the precept of ſeiſin in *Brisbane*'s diſpoſition, became a right of property in him, in the ſame manner as if a particular part of the lands had been excepted from the diſpoſition to his ſon; and therefore, whether that right of property ſhall be conſidered as *in hereditate jacente* of him, when the creditors of the ſon adjudged the eſtate upon a ſpecial charge to enter heir, or as already diſpoſed of to his younger children, by the exerciſe of this reſerved faculty; in either caſe, theſe younger children fall to be preferred, in virtue of their adjudications, to the creditors of the ſon. For if it ſhall be ſuppoſed, that the 8000 merks, at the time the adjudications were led againſt the ſon, was an eſtate *in hereditate jacente* of the father, in the ſame way that a reſerved property would have been, then the creditors of the father, or any claiming in his right, are preferable by act 24. parl. 1661, to the creditors of the apparent heir; becauſe, in terms of that ſtatute, they have done diligence within three years after the father's death. If, on the other hand, this reſerved eſtate ſhall be conſidered as given away by the father in his own lifetime, it could not be carried by an adjudication led againſt the ſon, upon a ſpecial charge to enter heir to his father; and therefore ſtill remained with the younger children, notwithſtanding ſuch adjudication.

3*tio*, The adjudications led by the creditors could not carry the reſerved right in the father, which was neither *in hereditate jacente* of him, nor diſponed to his eldeſt ſon. All that they could carry, was the perſonal right to the lands, with the exception of the reſerved right: for the ſon had only a perſonal right to the lands by the father's diſpoſition; and accordingly the adjudications ſpecially mention and adjudge that perſonal right. And therefore, taking the matter in this light, there ſeems to be no doubt, that the younger children are preferable, for the 8000 merks, to any deriving right from the ſon to the diſpoſition granted to him by his father, as the power to burden with that ſum was expreſsly contained in the diſpoſition. The creditors derive right from *Francis*, as legal aſſignees to the father's diſpoſition, and they ſaw that it was burdened with this faculty. If, indeed, *Francis* had made

made up titles to his father, by ſerving heir in ſpecial to him, as infeft and ſeiſed in the lands, creditors and purchaſers might have been in ſafety to contract with him, upon the faith of this ſimple and unlimited right appearing in him upon record: But the preſent caſe is different; for they ſaw, that he had only a perſonal right by the diſpoſition, clogged with a reſerved faculty.

Anſwered for the creditors, It is plain, from the whole tenor of the act 1661, that it applies only to the caſe where the eſtate is left *in hereditate jacente* of the defunct, not diſponed away by him during his life, and where it is neceſſary for the heir to make up titles by ſervice. In ſuch caſe, the law has given the *creditors* of the deceaſed three years, during which they may eſtabliſh a preference to themſelves by real diligence upon the eſtate. —— But if he diſponed away the eſtate in his own life, either to his apparent heir, or to any other perſon, the caſe does not fall within the ſtatute; nor does it make any difference, whether, in diſponing his eſtate in his lifetime, he reſerved any powers or not. —— The extraordinary privilege given by the ſtatute, applies ſingly to the caſe where the property of the eſtate was left *in hereditate jacente*.

Beſides, ſuppoſing the eſtate had really remained with *James Henderſon*, the younger children could have taken no benefit from the act 1661; becauſe they cannot qualify themſelves to be his *creditors:* for he came under no obligation whatever to pay them any ſum of money. The only ground of their claim is, that he left them a legacy of 8000 merks, with which he had a power to burden the eſtate. ——Upon this legacy the younger children brought a proceſs againſt their brother, and obtained a perſonal decree againſt him for payment. By this decree they became creditors, not to their father, but to their brother; and they adjudged his eſtate along with his other creditors.

Neither is there any ground in common law, upon which this preference can be eſtabliſhed. One of the great advantages we enjoy in this country, is the ſecurity ariſing from the records. Suppoſing a proprietor ſhould expreſs his intention in the cleareſt manner, to ſubject his lands to a burden; yet, if it is not ſo conceived, that it can appear from the record, who are the parties intitled to claim under that burden, the law will not allow it to be effectual. Such is the caſe of diſpoſitions and infeftments. It is inconſiſtent with feudal principles, and with the ſecurity of the records, that a real right or burden ſhould be eſtabliſhed in perſons unknown.——The ſame thing holds with regard to faculties reſerved by diſponers. Such faculty imports no more than a power in the diſponer to burden, or perhaps to alienate, the lands: but that power muſt be exerciſed in a manner conſiſtent with feudal principles, and the ſecurity of our records; otherwiſe it can have no effect againſt third parties, who have properly eſtabliſhed a right to the lands, whether by voluntary or legal titles.—He may indeed grant infeftments in exerciſe of the faculty; and theſe will be good againſt the diſponee, or any perſon deriving right from him: but if no infeftment appears, and after the diſponer's death, when the faculty is at an end, the diſponee ſells, or contracts debt, or his creditors affect the lands, a perſonal deed of the diſponer will not be intitled to compete with creditors or purchaſers infeft by the proprietor.

No man can, by a reſerved faculty to burden lands, have a greater

power, than if he had reſerved a part of the fee: and as, in that caſe, his perſonal deeds could not affect the lands, nor compete with real rights granted by the heir, after his own fee is at an end; ſo it is equally inconſiſtent to ſuppoſe, that a perſonal bond or legacy, granted by one who has a reſerved faculty, ſhould affect the land. — Such perſonal act or deed cannot be diſcovered from any record; and therefore it would be putting lands *extra commercium*, to give it the effect pleaded for by the younger children. The general rule is, That the preference muſt be determined by the priority of infeftment; and if no infeftment appears when the faculty is expired, the lands are ſubject to the deeds of the proprietor, without any reſtraint. — Agreeable to theſe principles, many deciſions have been pronounced; 16th *December* 1708, *Davidſon* againſt the town of *Aberdeen*; *February* 1719, *Rome* againſt the creditors of Provoſt *Graham*, obſerved in *Home*'s ſelect collection, N° 16; 23d *December* 1724, *Sinclair contra Sinclair*; 26th *June* 1735, Daughters of *Robert Ogilvie* of *Coull*, *Dictionary*, *vol.* 1. *p.* 293. And the caſe of the creditors and children of the Laird of *Mouſwell*, 6th *January* 1677, obſerved by Lord *Stair*, does not contradict theſe principles. For it was not there found, that the father's perſonal bond would have been a real burden upon the lands, or could have competed with the appriſers; on the contrary, it was ſuppoſed in the argument, that it could not, and that the preference of the children was owing to their prior infeftment.

Replied, None of theſe deciſions apply to the caſe of a ſingular ſucceſſor only in a perſonal right — Beſides, the three firſt of them relate to the caſe of a father's making a purchaſe to his ſon in fee, and to himſelf in liferent, under certain faculties; which is different from the preſent, where the father, having been *ab ante* fiar, muſt be conſidered ſtill to remain full proprietor, by the reſervation of that faculty, ſo far as the ſame extends.

" The Lords found, That the reſpondents were only preferable for " the 8000 merks, according to their diligence." I. C.

For the children, *Da. Græme.* For the creditors, *Lockhart* and *Ferguſon.* Clerk, *Gibſon.*

N° CCLXVII. 19th *November* 1760.

CHRISTIAN SHEPHERD, relict of *William Mowat*,

AGAINST

ALEXANDER INNES.

Sufficient to ſupport bills ſigned by initials, that the party acknowledges they were truly adhibited.— No ground of reducing bills granted for an apprentice-fee, That the ſum was not inſerted in the indenture, nor the principal indenture ſtamped; the maſter having ſubjoined the ſum to an extract of the indenture, and got the extract ſtamped, on payment of the duty; though this was done after the death of the apprentice.— The whole apprentice-fee is exigible, although the apprentice ſhould die before expiration of the indenture.

Chriſtian Shepherd, whoſe ſon, *James Mowat*, had, by indentures executed in *May* 1750, entered an apprentice to *Alexander Innes*, commiſſary-clerk

miſſary-clerk and advocate in *Aberdeen*, for a term of three years, but deceaſed in *October* following, brought a reduction, in 1755, of three bills, of 100 merks each, accepted by her on the 2d *Auguſt* 1750, payable to *Innes*, as her ſon's apprentice-fee.

Innes produced an extract of the indenture, ſtamped, with a notandum ſubjoined, in theſe words: "Notwithſtanding that there is no apprentice-fee contained in the foregoing indentures, there was 300 merks really and truly ſecured to me, the foregoing *Alexander Innes*." (Signed) "ALEXANDER INNES." As alſo a receipt wrote upon the back by the defender's brother, then clerk to the collector of the ſtamp-duties, of this tenor: "*Stamp-office, Edinburgh*, 25th *June* 1755. Received 8 *s.* 4 *d.* for the duties of 6 *d. per* pound, according to the ſtatute."

The Lord Ordinary "repelled the firſt reaſon of reduction, That the bills libelled were not duly ſigned, in reſpect it was acknowledged, that the initials ſubjoined to the bills were truly adhibited by the purſuer: Repelled alſo the ſecond and third reaſons of reduction, That the ſum given in name of apprentice-fee was not filled up in the indenture, and that the indenture was not ſtamped in due time; in reſpect of the ſeveral acts of parliament indemnifying ſuch omiſſions, and that the indenture was now ſtamped, and the ſum given in name of apprentice-fee ſubjoined to the indenture: And alſo repelled the fourth and laſt reaſon of reduction, founded upon the death of the apprentice before the expiration of the indenture, in reſpect the non-performance of the contract was not occaſioned by any fault on the part of the defender, the maſter; and aſſoilzied from the reduction, and decerned."

Pleaded in a reclaiming petition for *Shepherd*, the purſuer, 1*ſt*, The reaſon why a ſubſcription by initials has been ſuſtained, is, that it is a party's ordinary ſubſcription that makes a writ effectual. Accordingly, in the caſe, Earl of *Traquair contra Gibſon*, 9th *February* 1723, the Lords would not ſuſtain a ſubſcription by initials, without a previous proof, that ſuch was the party's uſual manner of ſubſcribing.—But as that is not pretended in the preſent caſe, the objection reſolves in this, That initial letters are not writing, in the common acceptation of mankind, or in the ſenſe and ſpirit of the act of parliament, requiring the ſubſcription of parties, or the atteſtation of notaries for them.

In the conſtruction of this ſtatute, the purſuer has no occaſion to controvert, that great latitude ought to be given, where the party is proved to have adhibited conſent, upon receiving value at the time.—It is not pretended, that ſhe is a party to the indenture, or that the bills are of the ſame date, or that they were granted in conſequence of a ſtipulation or agreement then made for the apprentice-fee. They are not ſubſcribed before the witneſſes to the indenture, or indeed any other: and conſequently, as it is the writing, and not the preſumed conſent, that muſt ſupport the bills, it is either incumbent on the defender to prove, that theſe two letters, *C. S.* is the granter's ordinary ſubſcription, or otherwiſe they fall under the certification of the ſtatute.

2*dly*, The acts indemnifying omiſſions, have in view the caſe of the apprentice as well as that of the maſter; and provide, That if the duties are paid within the time limited, it ſhall be available to give the

apprentice

apprentice the privilege or freedom of uſing his trade.——It is therefore too late to ſtamp the indenture after the death of the apprentice, who is the perſon chiefly concerned to ſupply the original neglect.—— And it would be a miſconſtruction of the ſtatute, to allow the maſter, from this late act of his, five years after the death of the apprentice, and even poſterior to his being cited in this reduction, to validate a null indenture.

But, *ſeparatim*, Suppoſing it had been even then competent for the defender to ſupply the defect, yet he has not done it. —— The act of Queen *Anne* requires, that the ſheet of vellum or parchment upon which the indentures are wrote, ſhall be ſtamped. And the fact is, that the original, which lies as the warrant of the extract, ſtill remains unſtamped. —— The duties are payable for every piece of vellum or parchment on which ſhall be written any indenture, *&c.* and therefore, neither in the words nor intendment of the ſtatute, does the ſtamping an extract of the indenture anſwer the directions of the law. And the indemnity-act is ſtrictly confined to the indentures or contracts, which, by the former acts of Queen *Anne*, require to be ſtamped, *&c.*; that is, the principal indenture. —— It was improper in the defender, to add a ſyllable to the extract more than is in the principal writing; and the conſequence ought to be, totally to diſcredit the extract *in pœnam* of the defender, who has preſumed to make that addition.

The ſubjoining to the indenture the ſum given in name of prentice-fee, is another addition to the indenture, which the defender had no power to make. After writs are once ſigned, and mutually delivered, neither of the parties can lawfully add or alter one ſyllable in the writing. The notandum that is made to the extract, or to the defender's copy, was not done *unico contextu* with the indenture itſelf; but an addition *ex poſt facto*, with a view to obviate this particular ground of reduction. Beſides, the purſuer, in point of fact, cannot agree to the truth of the addition: For ſhe denies, that there was any agreement, at the date of the indenture, to give 300 merks as apprentice-fee. She was indeed fooliſhly induced to grants the bills ſome months before the boy's death; but, as the boy was ſickly during moſt of the time he was in the defender's ſervice, and did not even learn the rudiments of his profeſſion, ſhe did not expect the money was ever to be exacted.

" The Lords adhered to the Lord Ordinary's interlocutor, and refu-
" ſed the deſire of the petition, in regard to that point, of the bill's
" not being duly ſigned; but with regard to all the other points, or-
" dained the petition to be ſeen and anſwered."

Argued for the defender, The indenture in queſtion was executed in a way which is very uſual. The apprentice-fee is commonly paid down in ready money, and therefore no mention of it made in the indenture. In this caſe, the defender having no diſtruſt of the purſuer, gave her credit for the money agreed on as the apprentice-fee, which was 300 merks, and did not even inſiſt to have her ſecurity for ſome months thereafter, when ſhe granted the bills in queſtion. Theſe bills were granted for a valuable and adequate conſideration, *viz.* his undertaking to inſtruct and train up the purſuer's ſon in his profeſſion. He had performed the moſt laborious part of this undertaking, during the ſpace that the lad lived with him: And it was owing to no fault or deficiency

cy on his part, that he did not proceed to accompliſh the reſt. Upon theſe conſi erations, the defender thought himſelf intitled to demand and receive payment of the whole apprentice-fee.

The omitting to fill up in the indenture the ſum given in name of apprentice-fee, and the not ſtamping the indentures in due time, certainly fall under the ſeveral acts of indemnity, now that the indenture is ſtamped, and the ſum given in name of apprentice-fee ſubjoined to the indenture. The ſeveral penalties enacted by the *Britiſh* ſtatute 8*vo Annæ*, if the directions of that ſtatute are not obſerved, are only intended to inforce obedience to the law, and payment of the public duties; and therefore many different laws have been made, to put it in the power of parties who are liable to ſuffer by theſe penalties, to rectify their original omiſſion, and by payment of the duties, to receive the benefit of their indentures. —— Thus, with reſpect to the apprentice, remedies are provided by the ſtatutes, the 18th of the King, *c.* 22. § 24. and 25. and 20th of the King, *c.* 45. On the other hand, for encouragement to the maſter ſtill to pay the duties, though originally not paid according to the directions of the law, there is every ſeſſion of parliament a clauſe in an act, indemnifying ſuch offences againſt the law. Accordingly, by an act paſſed in the ſeſſion of parliament 1755, it is provided, that where perſons have neglected in their indentures the directions of the law; yet, if they ſhall ſtill pay in the rates and duties on or before the 1ſt day of *Auguſt* 1755, the ſame indentures *ſhall be good, and available in law and equity, or may be given in evidence in any court whatever.* —Upon the faith of and in conformity to this ſtatute, the defender did, upon the 25th *June* 1755, pay the rates and duties chargeable upon the apprentice-fee in queſtion, of which he obtained a receipt from the ſtamp-office, of that date, and the proper ſtamp upon the back of the indenture. And from this ſtate of the laws, it will admit of no queſtion, that the indentures produced are as good and valid, to all intents and purpoſes, as if the apprentice-fee had been originally inſerted at length in them, the duties paid, and the ſtamp obtained in terms of the original act of parliament, or as if no ſuch act had ever been made.

The ſtatute makes no diſtinction, but makes a juſt and general proviſion in favour of the maſter, that all indentures ſo ſtamped before the 1ſt *Auguſt*, ſhall be held as good as if they had been originally ſtamped. ——The purpoſe of theſe ſtamps is the collection of his Majeſty's revenue, which ought equally to be encouraged and protected, whether the apprentice be dead or alive.——The nullity introduced is no intrinſic original nullity in the contract or indenture; and therefore it may be ſupplied after the death of the apprentice. —— It only takes place ay and until the duties be collected; which may be as well after as before the death of the apprentice.

The act 8*vo Annæ* does not ſpeak of the *vellum* or *parchment* upon which indentures are wrote, but of the *paper* or *parchment*; and it is all one in the ſpirit and intendment of that ſtatute, whether the original indenture, or an extract, which in this country is held equivalent, be ſtamped, as having paid the duty.

It is an agreed fact, that the onerous cauſe of theſe bills was for apprentice-fee; and as the indentures have become unqueſtionably as good as if originally ſtamped, by the expreſs words of the ſtatute, the purſuer has no ground to reduce theſe bills, upon pretence that the indentures are null. —— The addition made to the extract can hurt no

mortal, nor is there any ground for the alarm given by the purſuer, of the danger of allowing any addition to be made to extracts. Had the apprentice been alive, he would have profited by it, as well as the maſter, as the indentures were thereby rendered valid; and the only uſe and intention of the addition, was to certify to the ſtamp-maſter how much duty was to be paid.

Where the preſtations undertaken by the maſter become impracticable, and the apprenticeſhip does only endure for a ſhorter ſpace than the term of the indenture, without any fault or deficiency imputable to the maſter, there is no good reaſon why any part of the apprentice-fee ſhould be abated. —— All incumbent on the maſter, in return for the apprentice-fee, is, that he ſhall do his duty, while the apprentice remains with him. If he is cut off by the hand of God, the maſter ſuffers the loſs as well as others who have a concern with him.—— If he ſhould wilfully deſert his ſervice, the maſter does no more literally fulfill the terms of his engagement than in the former caſe: Yet it will not be pretended, that a parent, contracting an apprentice-fee with him, would in this caſe be intitled to refuſe payment. —— Upon the ſame principle it is, that if a maſter die in the middle of a term, the ſervant is intitled to his full wages; *l.* 38. *ff. Locat.*

" The Lords adhered to the Lord Ordinary's interlocutor."

Act. *Al. Gordon junior.* Alt. Solicitor *Garden.*

N. B. The following caſe was likewiſe omitted to be inſerted in its proper place.

N° CCLXVIII.

N° CCLXVIII. 12th *February* 1760.

JOHN FORRESTER,

AGAINST

JAMES BOUTCHER, and others.

A perſon preſumed to be dead, upon a proof of common fame and belief.

IN a reduction of a decreet of adjudication, led in the 1740, againſt *David Yule*, as lawfully charged in 1739 to enter heir to his father, among other reaſons it was *alledged*, That *David Yule* had been dead ever ſince the year 1732; and therefore that the charge to enter heir, and the adjudication thereon, muſt be null and void, as having proceeded againſt a perſon dead.

David Yule's death being denied by the defenders, a proof before anſwer was allowed, and taken in the year 1754.

Several witneſſes concurred, that there was a current report that *David Yule* had gone aboard a ſhip at *Philadelphia*, bound for the *Weſt Indies*, and that this ſhip had never after been heard of. One witneſs ſaid, He was at *Philadelphia* when that ſhip ſailed with *David Yule* on board; and before he left *Philadelphia*, ſhe was amiſſing, other ſhips having come from her deſtined port, after the time ſhe ought to have arrived there, and brought no account of her: He further ſaid, that he had been frequently at *Philadelphia* ſince that time, and heard the ſame report; and had alſo been informed there, that the wife of the maſter of that ſhip had married another huſband.

This proof was adviſed *ex parte*. The purſuer's counſel *alledged*, That though it amounted to no more than common fame and belief, yet that was ſufficient to preſume *David Yule* dead, unleſs a contrary proof ſhould be brought that he was alive: That the degree of common fame the court had proceeded upon in like caſes, would appear from the following deciſions; *Spottiſwoode*, voce *Summons*, 29th *February* 1628, *Ruthven*; 18th *February* 1670, *Laurie*; 25th *July* 1677, *French*; 2d *January* 1752, *Brown contra Ogilvie*.

"The Lords, on adviſing the proof, found the facts proven ſufficient "to preſume, that *David Yule* was dead before he was charged to "enter heir; and therefore ſuſtained the objection, That he was "dead before he was charged to enter heir; and reduced, de-"cerned, and declared accordingly; and remitted to the Lord "Ordinary to proceed on the other points in the cauſe." 1. c.

Act. *Dav. Dalrymple.* Clerk, *Gibſon.*

No XX. *Eliſabeth Maule, widow of Thomas Ker, againſt James Graham of Methie.*

March 9. 1758. Ordered and adjudged, That the appeal be diſmiſſed; and that the ſeveral interlocutors complained of be affirmed.

No XXV. *James Boyle, Eſq; and others, late counſellors of Irvine, againſt John Cumming, provoſt, and others, magiſtrates and counſellors of the ſaid borough.*

Dec. 15. 1757. Ordered and adjudged, That the interlocutors complained of be reverſed; and that, by the ſet of the borough of Irvine, the day of leeting the magiſtrates for the ſaid borough is the Friday preceding the firſt Monday after Michaelmas yearly: And it is further ordered, That the appellants be aſſoilzied; and that the reſpondents do pay to the appellants their coſts of ſuit in the court below; and that an account thereof be given in.

No XLVI. *Jean Hay, claimant on the eſtate of Lovat, againſt his Majeſty's advocate.*

April 24. 1758. Ordered and adjudged, That the two laſt interlocutors complained of be reverſed; and that the reſpondent's claim be diſmiſſed.

No LXXVIII. *Truſtees for repairing the turnpike-roads from North Queensferry to Perth, againſt the magiſtrates and town council of Perth.*

April 10. 1757. Ordered and adjudged, That the appeal be diſmiſſed; and that ſo much of the ſaid interlocutor as is therein complained of, (*viz* that which found the houſeholders of the borough of Perth liable in the ſtatute-work of the turnpike-roads), be affirmed.

No LXXIX. *John Ramſay of Auchtertyre againſt the Reverend Mr John Gowdie.*

June 1. 1758. Ordered and adjudged, That the ſeveral interlocutors complained of be affirmed.

No XCIV. *Creditors of Humby againſt his children.*

Dec. 7. 1758. Declared, That it appears not to be neceſſary, in the preſent cauſe, to determine the queſtions ariſing upon ſo much of the interlocutor as is complained of by the croſs appeal, (*viz.* that which found, That the tailzie having been made, executed, and completed, by infeftment, before the ſtatute 1685, there was no neceſſity of recording it in the regiſter of tailzies appointed by that ſtatute; and that the clauſe in the tailzie, annulling the debts contracted, or deeds granted by the heirs of tailzie contrary to the prohibitions and conditions of the tailzie, extends to all debts and deeds in general); and therefore ordered the croſs appeal to be diſmiſſed: And it is further ordered and adjudged, That the original appeal be diſmiſſed; and that ſo much of the interlocutor as is therein complained of (which found, That the tailzie contains no reſolutive clauſe, forfeiting the right of the heirs of tailzie who ſhould contravene the prohibitions and conditions thereof; and therefore that the tailzie cannot be effectual againſt the onerous debts and deeds of the heir of tailzie in poſſeſſion, or bar the creditors from proceeding in the preſent action of ſale of the tailzied eſtate) be affirmed.

No XCV. *Katharine Ducheſs dowager of Gordon, and Duke of Gordon, againſt John Gordon.*

March 21. 1759. Ordered and adjudged, That the appeal be diſmiſſed; and that the interlocutors complained of be affirmed.

No CXVIII. *John Grant againſt Thomas Forbes.*

March 29. 1759. Ordered and adjudged, That the appeal be diſmiſſed; and that the interlocutors complained of be affirmed.

No CXXIX. *William Earl of Home againſt the officers of ſtate.*

March 7. 1759. Ordered and adjudged, That the interlocutor complained of be reverſed; and that the interlocutor of June 27. preferring the crown to the patronage in queſtion, be affirmed.

No CXLV. *John Philp againſt the Earl of Rothes.*

Jan. 16. 1761. Declared, That entails created of lands in Scotland, with prohibitive, irritant, and reſolutive clauſes, before the making of the act of parliament concerning tailzies in 1685, ought to be recorded in the regiſter of tailzies, according to the ſaid ſtatute; and it is therefore ordered and adjudged, That the appeal be diſmiſſed; and that the interlocutors complained of be affirmed.

No CCXII. *Daniel Campbell of Shawfield, &c. againſt William Muir of Caldwall.*

Dec. 1. 1760. Ordered and adjudged, That the petition and appeal be diſmiſſed; and that the two interlocutors therein complained of be affirmed.

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Brown	Scoular	193	108
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Buchan	Freebairn	447	245
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Burges	Halliday	188	106
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Chalmer and Roſs	Macculloch, &c.	115	68
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Clark	Gordon	418	226
Clerk	Brebner	364	203
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The creditors of vaſſals forfeited for the rebellion 1715, were not obliged, by the veſting act, to enter claims to affect their debtors eſtates falling to the ſuperiors by the clan-act. No 27. *Stewart of Blairhall againſt Stewart of Appin, June* 22. 1757.

Diſpoſition of a ſuperiority, in order to give a vote, upon which charter and infeftment followed, but no other delivery, found not good againſt the crown's right by forfeiture. No 36. *Fraſer of Inverallachy againſt his Majeſty's advocate, July* 6. 1757.

A penſion granted to an agent for life, and while he ſhould continue to act faithfully to his conſtituent, found not to be vacated by the granter's forfeiture. No 38. *William Fraſer junior againſt his Majeſty's advocate, July* 6. 1757.

In claims upon forfeited eſtates for bonds of proviſion, delivery prior to the 24th of June 1745 muſt be proved. No 138. *Younger children of Cameron of Lochiel againſt his Majeſty's advocate, Dec.* 1. 1758.

No annualrents due on claim on forfeited eſtate. No 143. *Aſſignee of Angus and Company againſt his Majeſty's advocate, Dec.* 7. 1758.

See Jus tertii, No 157.

FORUM COMPETENS. A ſtranger is intitled to apply to this court, by petition to the Lord Ordinary on the bills, for a warrant to arreſt *juriſdictionis fundandæ cauſa*. No 136. *Ford ſupplicant, Nov.* 21. 1758.

Arreſtment on the border-warrant of a ſheriff, founds a juriſdiction in the court of ſeſſion. No 155. *Hardie againſt Liddel, Jan.* 4. 1759.

The juriſdiction of the court of ſeſſion over natives of Scotland reſiding at Campvere, *ratione originis*, not excluded by that of the Conſervator. No 225. *Hog againſt Tennent, June* 27. 1760.

FRAUD. A perſon buying goods when he knew himſelf

himſelf to be inſolvent, the ſale was found reducible, and the ſeller preferable on the price of the goods in the hands of a third party, to whom the inſolvent perſon had diſpoſed of them. No 47. *Creditors of Robertſon againſt Udnies and Patullo, July* 27. 1757.

General allegations of fraud inſiſted on for reducing a tack, found irrelevant, and a proof at large refuſed. No 95. *Ducheſs-dowager of Gordon and Duke of Gordon againſt John Gordon, Feb.* 8. 1758.

Sale reduced on the head of fraud. No 210. *Mr Michael Menzies againſt Macharg, &c. Jan.* 9. 1760.

See Mutual contract, No 132.

FREEHOLERS, ROLL OF. The lands on which a freeholder claimed to be inrolled being proved, by a retour before 1681, to have been extended, together with an annualrent of one merk out of the other lands, at 12 merks in whole for the lands, and the right of annualrent; this was found to be ſufficient evidence, that the lands were more than 40 s. of old extent. No 61. *Fordyce of Gaſk againſt Urquhart of Meldrum, Dec.* 20. 1757.

Not competent to a meeting of freeholder to reject a claimant's title on account of his author's being barred from diſponing by a ſtrict entail. No 212. *Campbell of Shawfield againſt Muir of Caldwall, Feb.* 5. 1760.

Import of the objection of nominal and fictitious. *Ibid.*

Certificate under the hands of two commiſſioners of ſupply and their clerk, is ſufficient evidence of the valuation to a meeting of freeholders; and it is enough if the decreet of diviſion is finiſhed any time before the meeting. *Ib.*

A title is not held to be nominal, or fictitious, where the claimant truly poſſeſſes the whole right granted to him by the deed. No 215. *Grant of Drumphad againſt Campbell and others, Feb.* 22. 1760.

Wadſet of a ſuperiority, where the feu-duty payable to the wadſetter was preciſely equal to the intereſt of the redemption-money, found a proper wadſet, ſo as to intitle to a vote. *Ibid.*

Found, That the diſponee, after executing the procuratory in his diſpoſition, and taking out a charter from the crown, might ſtill take infeftment on the precept in the diſpoſition. *Ib.*

Freeholder infeft in the juſt and equal half *pro indiviſo*, of lands rated *in cumulo* in the ceſs-books at L. 1000 Scots of valued rent, is not intitled to a vote. No 218. *Sir Michael Stewart, &c. againſt Capt. Pollok, March* 6. 1760.

Body-corporate cannot ſtand on the roll of freeholders. No 219. *Sir Michael Stewart againſt the borough of Paiſley, March* 6. 1760.

In an application to the commiſſioners of ſupply, for dividing the valuation of lands charged *in cumulo* in the ceſs-books, it is not neceſſary to make the ſuperior a party. No 240. *Earl of Home againſt Broomfield, July* 24. 1760.

G

GENERAL ASSIGNATION. Ready money lying in the defunct's cuſtody at his death, found not comprehended under a diſpoſition of his goods, gear, and houſehold pleniſhing. No 135. *Winifred Johnſton againſt Mary Wilſon, Nov.* 17. 1758.

Adjudication on which infeftment had been taken, found conveyed by a general clauſe, in a diſpoſition of all debts and ſums of money, real and perſonal. No 257. *Wades againſt the heir of Marſhal Wade, Dec.* 11. 1760.

GROUNDS and WARRANTS. Letters of general charge, upon which an inhibition proceeded, need not be produced after twenty years, tho' the party does not deny that he has them. No 39. *Wilſon againſt Sellers, July* 6. 1757.

Found neceſſary to produce the grounds of an appriſing led in 1644, in a competition with a poſterior appriſing, with regard to the reverſion of wadſet-lands contained in both appriſings, but poſſeſſed by neither of the parties. No 204. *Mackenzie againſt Roſs and Cuthbert, Dec.* 20. 1759.

H

HEIR AND EXECUTOR. Queſtion of relief between heir and executor in the caſe of an annuity to a widow. No 152. *Mullo againſt Mullos, Dec.* 20. 1758.

HEIR-APPARENT. Apparent heir cannot remove tenants. No 69. *Paton againſt Mackintoſh, Dec.* 15. 1757.

The ſame. No 195. *Sutherland againſt Graham, Aug.* 3. 1759.

A man having left a daughter, and his wife with child, who brought forth a poſthumous ſon, and this ſon having died ſoon after without making up any title, the *annus deliberandi*, competent to the daughter, was found to recommence upon the death of the ſon. No 76. *Summers againſt Simſon and Gardner, Dec.* 23. 1757.

Rents unuplifted during apparency, do not belong to the apparent heir's executor, but to the next heir. No 254. *Mrs Euphame Hamilton againſt Mr Archibald Hamilton, Dec.* 5. 1760.

HEIR-PORTIONER. A dwelling-houſe, *&c.* built within a borough of barony, diſcontiguous to the reſt of the heritor's landed eſtate, falls not to his eldeſt heir-portioner as a *præcipuum*. No 90. *Jean Wallace againſt Janet Wallace, Jan.* 20. 1758.

HERITABLE AND MOVEABLE. Sum found moveable *quoad* the *jus mariti*, notwithſtanding a ſupervenient heritable ſecurity. No 56. *Fullarton againſt Scot, Nov.* 15. 1757.

HIGHWAYS. Juſtices of peace and commiſſioners of ſupply have a diſcretionary power to determine what roads ſhall be firſt repaired, and to divide the ſhire into diſtricts; but cannot call out any perſons to work at the roads who live at ſuch diſtance as that they cannot come and go in a day, and work a day's work, under any higher a penalty than the 9th act, parl. 1670, directs. No 1. *Juſtices of peace of Berwickſhire againſt Tenants of Cockburnſpath, Jan.* 4. 1757.

Inhabitants of royal boroughs found liable in ſtatute-work on the highways. No 78. *Truſtees of the turnpike-roads from North Queensferry to Perth againſt magiſtrates of Perth, Feb.* 1. 1757.

Whether may the whole inhabitants of a borough be called out to repair highways? No 84. *Truſtees of Glaſgow turnpike againſt the inhabitants of Paiſley, Jan.* 11. 1758.

Perſons liable in ſtatute-work for the three days before harveſt, muſt be called out before the end of June. No 261. *Walker and Herd againſt Thomſons, Dec.* 17. 1760.

See Community, No 15.

HOMOLOGATION. Deathbed-diſpoſition effectual to a legatee, if the heir does any thing acknowledging it. No. 233. *Chriſtian Anderſon againſt Anderſons, July* 15. 1760.

See Writ, No 113.

HUSBAND AND WIFE. Private agreement, ſet-

tling the amount of a ſeparate maintenance, is revocable by the wife. No 5. *Marjory Cramond againſt Allan, Jan.* 4. 1757.

A wife having ſucceeded to a debt ſecured by adjudication, granted a diſcharge to the debtor, upon his paying part in caſh to the huſband, and granting bond to him for the reſt; this was found revocable by the wife, as a *donatio inter virum et uxorem*, and action was ſuſtained to her againſt her huſband's heirs for repetition. No 153. *Margaret Maclellan againſt children of Hugh Hawthorn, Dec.* 22. 1758.

Huſband's power over the goods in communion. No 223. *Campbells againſt Campbell of Ardnave, June* 26. 1760.

HYPOTHEC. *See* Recompence, No 86.

I

IMPLIED CONDITION. A perſon having granted a diſpoſition to his ſon, with a power of revocation, and burdened with the payment of a certain ſum to his grandſon at the firſt term after the granter's death, this proviſion was found vacated by the predeceaſe of the grandſon. No 60. *Iſabel Gordon againſt Katharine Roſs, Nov.* 17. 1757.

Proviſions to daughters in a contract of marriage, found to be due at the diſſolution of the marriage, though not payable till the father's death. No 109. *Mary Macdonell againſt his Majeſty's Advocate, June* 20. 1758.

Conditio ſi ſine liberis, does not take place where the father has known of his children without making any alteration. No 150. *Bethia Yule againſt Joſeph Yule, Dec.* 20. 1758.

Legacy does not fall by predeceaſe of the legatee where it is bequeathed to heirs, executors, or aſſignees. No 234. *Janet Inglis againſt Miller, July* 16. 1760.

Additional proviſion to a daughter failing heirs-male of the granter's body, does not take place if ſhe die before the heirs-male. No 263. *Macculloch of Mulderg againſt Roſs of Pitcalny, Dec.* 18. 1760.

See Clauſe, No 72.

See Forfeiture, No 38.

IMPROBATION. Not competent in a reduction-improbation, to allow a proof of poſſeſſion, in order to found preſcription upon titles produced, as ſufficient to exclude, after acts had been extracted for the firſt and ſecond terms. No 264. *Grant, &c. againſt Lady Clementina Fleming, Dec.* 23. 1760.

INDEFINITE INTROMISSION. *See* Debtor and Creditor, No 10.

INFEFTMENT. No equity will relieve againſt want of infeftment. No 39. *Wilſon againſt Sellers, July* 6. 1757.

INHIBITION. Inhibition recalled upon a debt not yet payable. No 52. *Stirling againſt Niſbet, Aug.* 11. 1757.

Inhibition refuſed to be recalled. No 53. *Dr Gregory againſt Helen Burnet, Aug.* 11. 1757.

Inhibition affects the leaſt preferable of the rights againſt which it ſtrikes, and not the whole of them *pro rata*. No 209. *Competition of the creditors of Langton, Jan.* 8. 1760.

IRRITANCY. Conventional irritancy of a tack not purgeable after decreet of removing is extracted. No 181. *Sir James Clerk againſt Bennet and Miles, March* 6. 1759.

JURISDICTION. Juriſdiction of the juſtices of peace cannot be prorogated. No 170. *Barlay and Agnes Smith againſt Chriſtie and Janet Smith, Feb,* 13. 1759.

Juſtices of peace have a juriſdiction as to bridges within the territory of a borough of barony. No 178. *Inhabitants of Sneddon againſt the magiſtrates of Paiſley, Feb.* 27. 1759.

Can an admiral-depute determine *in foro contentioſo*, between parties reſiding at a diſtance from the ſea, and in a queſtion not maritime? No 188. *Miller againſt Sawers, June* 27. 1759.

A ſingle juſtice of peace cannot judge any cauſe. No 230. *Margaret Mackay againſt Hercules, July* 10. 1760.

See Forum competens.

JUS QUÆSITUM TERTIO. A man having, in his contract of marriage, ſtipulated an annuity in favour of his ſtepmother, who was no party to the contract, it was found, that he could not afterwards revoke this annuity. No 156. *Marion Warnoch againſt Margaret Murdoch, Jan.* 8. 1759.

JUS TERTII. A claimant upon a forfeited eſtate having founded on a wadſet, as deriving right to it from the original wadſetter, but the conveyances having been loſt, it was found ſufficient that he was in poſſeſſion of the wadſet-lands, and produced a diſpoſition from the heirs of the original wadſetter. No 157. *Fraſer of Glenvacky againſt his Majeſty's advocate, Jan.* 8. 1759.

See Freeholders, No 212.

K

KING. Bond to the King effectual, though wanting the words *Domino Regi*. No 227. *Macdonald againſt Macneil of Tayniſh, July* 9. 1760.

KIRK-PATRIMONY. The kirk-lands of Dunrod, belonging formerly to the abbacy of New Abbay, afterwards granted to Sir Robert Spottiſwoode, afterwards to the Biſhop of Edinburgh, and laſt of all to Spottiſwoode again, were found to fall under the act 1690, cap. 29. whereby lands formerly holding of biſhops were made to hold of the crown. No 93. *Spottiſwoode againſt the creditors of James Naſmith, Feb.* 4. 1758.

L

LEGACY. Though a legacy falls by the predeceaſe of the legatee; yet, if heirs are named, the heir takes it upon his ſurvivance; and tho' he dies afterwards without making up titles, the legacy will fall to his neareſt in kin, and not to thoſe of the firſt legatee. No 234. *Janet Inglis againſt Miller, July* 16. 1760.

A teſtator having ordered the ſurplus of his effects, after payment of debts and legacies, to be divided equally *among his relations* not named in the teſtament, found, That his neareſt in kin, to whoſe children a legacy had been left, could not claim the reſidue to the excluſion of the other relations. No 236. *James Wharry againſt the relations of Edward Wharry, July* 16. 1760.

If an executor confirmed received ſufficiency of funds for payment of debts and legacies, the legatees are not liable in repetition to the creditors upon his inſovency. No 241. *Robertſon, &c. againſt Strachans, July* 29. 1760.

Legatee intitled to intereſt. *See* Annualrent, No 80.

See Clauſe, No 236.

LEGAL DILIGENCE. Adjudication in ſecurity of a debt *in diem* refuſed, in reſpect no proof was offered that the debtor was *vergens ad inopiam*. No 173. *Niſbet againſt Stirling, Feb.* 16. 1759.

LITIGIOUS. Challenge of a ſale on the head of fraud, found good againſt the creditors of the buyer

buyer who obtained heritable ſecurities from him during the dependence, though the proceſs was allowed to lie over nine years. No 210. *Mr Michael Menzies againſt Macharg and others*, *Jan.* 9. 1760.

LOCUS POENITENTIÆ. An obligation to diſpone lands contained in a miſſive letter delivered to the buyer, is binding without any written acceptance. No 197. *Muirhead againſt Chalmers*, *Aug.* 10. 1759.

M

MARRIAGE. *See* Foreign, No 168.

MESSENGER. Surety for meſſenger is liable for malverſations done to thoſe againſt whom the meſſenger is employed; — liable for him in expences of proceſs; — not free though the commiſſion was not recorded; — nor though the Lion was dead at the time of malverſation. No 118. *Grant againſt Forbes*, *July* 8. 1758.

MINOR. A minor having granted bond to ſome of his relations, obliging him to pay to them certain ſums upon the firſt term after his death, with a power of revocation, this was found to be a deed *inter vivos*, made by a minor without conſent of his curators, and therefore null. No 66. *Katharine Craig againſt Lindſay*, *Dec.* 14. 1757.

MUTUAL CONTRACT. One who purchaſes flour in ſacks, under a condition of returning the ſacks, or paying a certain ſum for each, will not be acquitted of his obligation by offering ſacks equally good, but muſt either redeliver the ſame, on oath, or pay the ſtipulated price. No 12. *Allaſon againſt Watſon*, *Feb.* 15. 1757.

Literal terms of an obligation corrected from the circumſtances of the caſe. No 81. *Coutts and Company againſt Allan and Company*, *Jan.* 9. 1758.

Bankruptcy of the huſband not relevant to reduce a marriage-contract, after the death of the wife, and failure of the iſſue of the marriage. No 132. *Angus againſt repreſentatives of James Wemyſs*, *Aug.* 3. 1758.

No action of damages found to lie againſt the ſeller of victual for non-implement, where the price was referred to the ſeller; and the buyer himſelf having died before the whole was delivered, his repreſentatives made a demand for the remainder; but without offering ready money, or caution for the price. No 247. *Marjory Steven againſt Robertſon*, *Nov.* 18. 1760.

Clauſe obliging the heritor to repay to the tenant, at the end of the tack, what he ſhall lay out on fences, is effectual, though the tenant purchaſe the lands during the currency of the tack. No 260. *Macdoual of Glen againſt Macdoual of Logan*, *Dec.* 17. 1760.

See Clauſe, No 81.

N

NEGOTIORUM GESTOR. *See* Diligence, No 20.

NOVODAMUS. A charter of reſignation from the the crown, in 1510, containing a *Novodamus*, with an expreſs grant of the patronage of Irongray, but without any evidence of poſſeſſion, found to convey a good right to the patronage, in competition with the crown claiming in right of the archbiſhop of Glaſgow, who had exerciſed one act of preſentation in 1668. No 111. *Riddel of Newhouſe againſt the officers of ſtate*, *June* 27. 1758.

P

PACTUM ILLICITUM. Action ſuſtained for the price of prohibited goods ſent on commiſſion, and which were ſeized upon their arrival. No 16. *Walker againſt Falconer*, *Feb.* 27. 1757.

It was found to be no defence againſt an action of relief, that the ſum engaged for by the purſuer was the price of the tranſaction of a criminal proceſs brought againſt the defender. No 146. *Macleod againſt Fraſer*, *Dec.* 14. 1758.

Obligation taken by one who procured an office for another, to pay an annuity to the officer's aunt, ſuſtained. No 167. *Katharine Young againſt Thomſon*, *Feb.* 9. 1759.

Simoniacal paction voided, and a fine impoſed. No 174. *Stephen againſt Lyel*, *&c.* *Feb.* 20. 1759.

A minor having got two rings worth L. 40, granted bond for 150 guineas, payable at the firſt term after his marriage, or death, and renewed the bond after majority, the bond was found good. No 228. *Sir William Maxwell againſt John Pringle*, *July* 9. 1760.

PARENT AND CHILD. A father found liable to pay an account of furniſhings to his ſon, though living ſeparately from him, he being minor, and not entered to any employment. No 119. *Barclay againſt Douglas of Dornock*, *July* 11. 1758

Father liable for furniſhings to his ſon above majority, while the ſon was apprentice. No 140. *Telfer againſt Maxwell of Dalſwinton*, *Dec.* 2. 1758.

PARLIAMENT. Britiſh act of parliament, when preſumed to be dated. No 117. *Robertſon againſt his Majeſty's advocate*, *July* 7. 1758.

PASSIVE TITLE. A relict intromitting with her huſband's effects in virtue of a general diſpoſition, found liable only for actual intromiſſions. No 67. *John Watſon againſt Jean Erſkine*, *Dec.* 14. 1757.

In a reduction of a diſpoſition by an apparent heir not three years in poſſeſſion, the poſſeſſion of the diſponee for three years was found equivalent. No 96. *Yule againſt Ritchie*, *Feb.* 10. 1758.

An onerous purchaſe from an apparent heir three years in poſſeſſion, cannot be defeated by an adjudication upon a gratuitous bond of a ſecond apparent heir, though deduced for behoof of the gratuitous creditor in the bond, and not of the ſecond apparent heir. No 115. *Burns againſt Pickens*, *July* 4. 1758.

Found, That an adjudication acquired by an apparent heir, on which he poſſeſſed during his father's life, did not fall under the act 1695. No 192. *Macneil againſt Matthie*, *July* 20. 1759.

The ſon of an heireſs poſſeſſing on apparency falls under the act 1695, though his father be alive, who has right to the liferent by the courteſy. No 224. *Irvine againſt Knox*, *June* 27. 1760.

PATRONAGE. A right of patronage, if underſtood to be diſſolved from the annexed property, along with the lands to which it was acceſſory, without being expreſsly mentioned in the act of diſſolution? No 87. *Graham of Balgowan againſt the officers of ſtate*, *Jan.* 17. 1758.

See Novodamus, No 111.

See Preſcription, No 129.

PENALTY. The penalty of a mutual contract upon which adjudication has not followed, cannot be exacted for indemnification of expences incurred in diſcuſſing a ſuſpenſion of the contract, where the other party was not ſpecially found liable in ſuch expences. No 77. *Allan againſt Young*, *&c.* *Dec.* 23. 1757.

PERICULUM. Carrier breaking agreement liable for every hazard. No 144. *Counteſs of Glaſgow againſt Thermes*, *Dec.* 12. 1758.

PERSONAL AND REAL. Clauſe of pre-emption, without an irritancy in a vaſſal's charter, not good

good against a purchaſer. No 4. *Sir William Stirling againſt Johnſton, Jan.* 4. 1757.

A proper wadſetter being diſpoſſeſſed, his claim for the rents is only perſonal, and not real, againſt the lands. No 22. *Macleod of Genies againſt Fraſer of Lovat, March* 9. 1757.

A perſon diſponing an heritable ſubject to his ſon, with the burden of paying a certain ſum to his grand-daughter; this was found a real burden on the ſubject, in competition with a creditor of the ſon. No 60. *Iſabel Gordon againſt Katharine Roſs, Nov.* 17. 1757.

Clauſe of return to the ſuperior on failure of the vaſſal's heirs-male, not good againſt an onerous purchaſer. No 194. *Captain Robert Johnſton againſt Marquis of Annandale, July* 31. 1759.

Reſerved faculty to burden with a certain ſum in a diſpoſition of lands by a father to his eldeſt ſon, being afterwards exerciſed by way of legacy to the younger children; theſe legatars were found to have no preference to the diſponee's other creditors; but intitled only to compete according to their diligence. No 266. *Younger children of James Henderſon againſt the creditors of Francis Henderſon, Aug.* 7. 1760.

PERSONAL AND TRANSMISSIBLE. The objection, That diligence was *intra annum deliberandi*, is not perſonal to the heir, but may be proponed alſo by creditors. No 76. *Summers againſt Simſon and Gardner, Dec.* 23. 1757.

A tack, though excluding aſſignees and ſubtenants, may yet be aſſigned by the tenant to his eldeſt ſon. No 171. *Hepburn of Smeaton againſt Burn, Feb.* 14. 1759.

Office of truſt, granted during life, with power to name a deputy, cannot be adjudged. No 201. *Marion Wilſon againſt Falconer, Dec.* 7. 1759.

PLANTING AND INCLOSING. Conterminous heritors are bound to be at equal expence in repairing and upholding march-dikes formerly built. No 91. *Lockhart of Craighouſe againſt Sievewright, Jan.* 20. 1758.

POLICE. In boroughs one may build as near the march as he pleaſes, providing no drop falls upon his neighbour. No 226. *Clark againſt Gordon, July* 8. 1760.

A houſe of office not a nuiſance. *Ibid.*

POOR. Maintenance of poor is a burden upon the pariſh of their birth, though they may have reſided in another pariſh for more than three years. No 19. *Kirk-ſeſſion of Invereſk againſt kirk-ſeſſion of Tranent, March* 3. 1757.

PRESCRIPTION. The magiſtrates and council of a borough having right to a toll, with the burden of repairing a bridge, the inhabitants were found to have acquired an exemption from it by preſcription, even as to carriages paſſing to and from their country-farms. No 26. *Mr James Miller againſt Storie, June* 15. 1757.

The production of a deed in a reduction and improbation, and aviſandum made, found not a ſufficient interruption of the negative preſcription. No 46. *Mrs Jean Hay againſt his Majeſty's advocate, July* 27. 1757.

But an obligation to ſubmit the claim upon the deed, having likewiſe been recovered, the interruptions were found ſufficient. *Ibid.*

Debts acquired by a huſband affecting his wife's eſtate, do not preſcribe during the marriage. No 63. *Gordon againſt Maj. Maitland, Dec.* 1. 1757.

Preſcription does not run during the minority of the perſon for whoſe behoof a right is acquired in truſt. *Ibid.*

Uſe of payment for forty years paſt, of an additional ſtipend, by the inhabitants of a borough of barony to their miniſter, found ſufficient to bind them in all time coming. No 75. *Mr David Turner againſt magiſtrates of Greenock, Dec.* 21. 1757.

Aliment of a baſtard child, if it falls under the triennial preſcription? No 97. *Marion Paterſon againſt Cochran of Kirkwood, Feb.* 14. 1758.

An expired adjudication, with infeftment, will be cut off by the negative preſcription, if no poſſeſſion has followed. No 105. *Anderſon againſt Naſmyth, March* 3. 1758.

A part of a feu-duty payable by a borough to the crown, having been gifted to an hoſpital, and the gift recited in the borough's charters, diſuſe of payment for above forty years found not to cut off the hoſpital's right. No 107. *The managers of King James* VI.*'s hoſpital in Perth againſt magiſtrates of Perth, June* 16. 1758.

Preſcription interrupted by the debtor's eſtate being annexed to the crown. No 117. *Robertſon againſt his Majeſty's advocate, July* 7. 1758.

Interrupted alſo by a ſummons againſt the forfeited perſon, though he had not *perſonam ſtandi. Ibid.*

How far can a right of patronage be acquired by the poſitive preſcription? and what title ſufficient for the crown to found ſuch preſcription? No 129. *Earl of Home againſt the officers of ſtate, July* 28. 1758.

See Teinds, No 120.

PRESUMPTION. The defence ariſing from three conſecutive diſcharges of feu-duties taken off by contrary preſumptions. No 11. *Grant againſt Maclean, Feb.* 11. 1757.

Delivery *retenta poſſeſſione*. No 40. *Henry Duke of Buccleuch againſt creditors of Francis Duke of Buccleuch, July* 8. 1757.

Prior aliment by a mother deemed to be *ex pietate*, notwithſtanding the child's ſupervenient fortune. No 43. *Jean Home againſt aſſignee of Lady Wedderburn, July* 12. 1757.

Bonds granted by a brother to his ſiſters, in ſatisfaction of former proviſions, and in full of legitim, are preſumed to have been delivered of their dates. No 63. *Gordon againſt Major Maitland, Dec.* 1. 1757.

A brother alimenting his ſiſters, found intitled to retention out of the annualrents of their proviſions. *Ibid.*

Debts affecting the huſband being purchaſed in the name of a truſtee for the wife, were preſumed to be acquired by the huſband's money, unleſs in ſo far as ſhe had funds excluſive of the *jus mariti*. No 99. *Macneil againſt Margaret Livingſton, Feb.* 14. 1758.

The ſubſiſtence of a right of wadſet preſumed in favour of the crown, an extract of the eiſin in favour of the wadſetter, who was forfeited, being produced. No 163. *Macdonell of Glengary againſt his Majeſty's advocate, Feb.* 8. 1759.

Implement of a contract preſumed, after a long interval. No 165. *Alexander Dunbar of Boath againſt Sir Harry Innes, Feb.* 9. 1759.

A ſimple indorſation of an equivalent-debenture preſumes value. No 237. *Lady Caſtlehill againſt Chriſtian Watſon, July* 17. 1760.

Novatio non præſumitur. See Ranking and Sale, No 6.

PRISONER. Magiſtrates found liable for the debt of a priſoner who had eſcaped through the negligence

gligence of the jailor. No 68. *Andrew Chalmer againſt Macculloch of Claſtullich and magiſtrates of Tain, Dec.* 14. 1757.

A priſoner having eſcaped by means of falſe keys, procured for him from a neighbouring town, by an accomplice, who opened the priſon-doors with them, the magiſtrates of the borough were not found liable for the debt. No 191. *Brodie againſt the magiſtrates of Elgin, July* 13. 1759.

A debtor liberated on the act of grace may be again impriſoned on the ſame diligence. No 186. *Abercrombie againſt Brodie, June* 19. 1759.

PROCESS. Effect of a decreet in abſence, proceeding upon a reference to oath, and holding as confeſſed. No 85. *Goldie againſt Katharine Macdonald, Jan.* 13. 1758.

A ſummons, by being called in the outer houſe by the clerk, becomes a depending proceſs. No 128. *Anne Roſs and William Wallace againſt Cleghorn, &c. July* 22. 1758.

Summons of forthcoming, raiſed and ſigneted before executing the arreſtment on which it was to be founded, if regular? No 169. *Orme againſt Macvicar, Feb.* 13. 1759.

After decreet, no ſummary complaint is competent. No 216. *Mr Adam Roſe petitioner, Feb.* 23. 1760.

See Community, No 15.

See Society, No 54.

PROOF. Narrative of a diſpoſition *inter conjunctos*, found not probative againſt creditors. No 40. *Henry Duke of Buccleuch againſt creditors of Francis Duke of Buccleuch, July* 8. 1757.

Bill granted on deathbed for a legacy, — not delivered, — or ſigned by the drawer during the granter's life, — are theſe facts probable by witneſſes againſt an onerous indorſee? No 73. *Farquhar againſt Shaw, Dec.* 16. 1757.

Deeds *inter conjunctos*, if they prove their narratives? No 99. *Macneil againſt Margaret Livingſton, Feb.* 14. 1758.

Narrative of a deed *inter conjunctos* does not prove its onerosity. No 162. *Boſwal againſt Margaret Arnot, Feb.* 7. 1759.

Obligation of relief of a debt conſtituted by writing cannot be created by parole evidence. No 142. *Reid againſt Proudfoot, Dec.* 6. 1758.

A donation *mortis cauſa* of a ſum of money exceeding L. 100 Scots, is effectual without writ, and may be proved by a quality of the party's oath. No 200. *Janet Mitchell againſt Wright, Nov.* 21. 1759.

Bond taken to a truſtee, and bearing value received from him, not reducible on the truſtee's deponing that he did not know of any value being paid. No 207. *Eliſabeth Hart againſt Pringle, Jan.* 2. 1760.

Unintelligible bond explained by extraneous evidence. No 227. *Macdonald collector of exciſe againſt Macneil of Tayniſh, July* 9. 1760.

A perſon preſumed to be dead, upon a proof of common fame and belief. No 268. *Forreſter againſt Boutcher, Feb.* 12. 1760.

PROPERTY. The proprietor of a ſalmon-fiſhing may erect works within his own bounds for the benefit of his fiſhing, though a ſuperior fiſhing ſhould be thereby hurt. No 42. *Trotter of Mortonhall againſt Hume of Ninewells, July* 9. 1757.

PROVISION TO HEIRS AND CHILDREN. An obligation in a marriage-contract to pay a ſum to younger children at a term during the father's life, conſtitutes them proper creditors. No 160. *Ballingall, &c. againſt younger children of Henderſon, Jan.* 31. 1759.

Meaning of a clauſe in a marriage-contract, whereby proviſions are made payable to younger children at their majority or marriage, in caſe there ſhall be a male child procreated of the marriage who *ſhall ſucceed* to the heritable eſtate. No 160. *Ballingall and others againſt Henderſons, Jan.* 31. 1759.

By a proviſion to heirs and bairns in a merchant's contract of marriage, not the heir of line, but the whole children are underſtood. No 220. *Creditors of Andrew Scot againſt younger children of Robert Scot, June* 13. 1760.

Bond by the eldeſt ſon to the younger children, in implement of a proviſion by their father, not reducible on the act 1621; though when he granted it his debts exceeded his effects, but no diligence had been done againſt him. *Ibid.*

A father becomes bound in his contract of marriage to ſecure a certain ſum to the heirs and bairns of the marriage, the children tranſmit this *jus crediti* to their heirs and ſingular ſucceſſors without a ſervice. No 255. *Mrs Porterfield againſt Gray, &c. Dec.* 9. 1760.

See Clauſe, No 109.

Q

QUALIFIED OATH. Quality in an oath found intrinſic. No 184. *Margaret Bett againſt Hardie, March* 1759.

QUOD POTUIT NON FECIT. *See* Approbate and Reprobate.

R

RANKING AND SALE. Method of accounting for the price of a bankrupt eſtate, in regard to intereſt. No 6. *Dr Middleton againſt Falconer of Monkton, Jan.* 7. 1757.

RECOMPENCE. A perſon having rebuilt and repaired the houſe of another, in virtue of a jedge and warrant from the dean of guild court, was found a preferable creditor for the expence laid out. No 86. *Donaldſon againſt Grant, &c. Jan.* 13. 1758.

Father, how far liable for furniſhings to his children. *See* Parent and Child.

REDEMPTION. A condition in a bond of reverſion, requiring the redemption to be made with the proper money and means of the reverſer, is not effectual to bar redemption. No 182. *Macintoſh of Borlum againſt Macintoſhes, Mar.* 8. 1759.

REGALIA. *See* Clauſe, No 221.

REGISTRATION. Who intitled to the cuſtody of the chancery records. No 196. *Smith againſt Ker, Aug.* 8. 1759.

REMOVING. A factor appointed by the Lords has power to remove tenants. No 41. *Thomſon againſt Elderſon, July* 9. 1757.

Warning only neceſſary in removings from land, not from a houſe, though in the country. No 149. *Lundin againſt Hamilton, Dec.* 19. 1758.

Warning not neceſſary againſt the repreſentatives of a tenant who had a tack for all the days of her life. No 214. *Tennent againſt Tennent, Feb.* 23. 1760.

REPARATION. Though a liferent granted to a wife by her huſband, on lands ſettled on him by his grandfather's entail, to which his title was afterwards reduced on his grandfather's contract of marriage, was ſuſtained as an onerous right, derived from one who was habilely veſted in the property, without any incumbrance appearing on record; yet the heir prevailing in the reduction, was found intitled to

relief againſt the huſband's proper eſtate, for that part of the liferent which was originally ſecured upon it before he ſucceeded to his grandfather's eſtate. No 253. *Agnes Stewart againſt the children and creditors of Capt. John Stewart, Dec.* 4. 1760.

See Diligence.

REPRESENTATION. A ſervice as heir-male in ſpecial upon a deed of entail, without reciting the prohibitory clauſes, found not to infer an univerſal paſſive title. No 63. ſum. 4. *Gordon againſt Major Maitland, Dec.* 1. 1757.

A ſervice as heir of tailzie and proviſion in general ſuſtained, though there was no expreſs reference to the deed under which the claimant was called, or to the ſubject contained in it. No 114. *James Hay againſt Lord Charles Hay, June* 30. 1758.

RES INTER ALIOS. In a challenge of a creditor's right affecting an eſtate, for behoof of the apparent heir to the original debtor, a decreet pronounced in a former challenge and competition, to which the purſuer's father, who then held the right of apparency, had been made a party, was held as a *res judicata*, though it was contended, That he was not a party to the former proceedings upon the footing of the right of apparency, which was not then known to him. No 265. *Hugh Crawfurd againſt Mrs Anne Randal, July* 15. 1760.

RIGHT IN SECURITY. Wadſet ſum conſigned, after an order of redemption uſed, but before decreet of declarator, found not arreſtable. No 102. *Major Cuningham againſt Wemyſs, Feb.* 15. 1758.

If an adjudger recovers partial payment out of a ſeparate ſubject, he can ſtill inſiſt to be ranked with the other creditors for the whole debt in his adjudication. No 127. *Creditors of Auchinbreck againſt Lockwood, July* 21. 1758.

S

SALE. Found relevant to diminiſh the price of lands, that they did not intitle to a vote, when it was bargained that they ſhould intitle. No 28. *Maclean of Lochbuy againſt Macneil of Collonſay, June* 23. 1757.

A ſeller preferred to the creditors of the buyer, where he retained the diſpoſition of the ſubject for ſecurity of the price. No 133. *Baird againſt Jap and his creditors, Aug.* 1758.

Sale of growing corns. *See* Bankrupt, No 154.

SEISIN. A ſeiſin, bearing delivery of *liferent ſtate and ſeiſin*, though proceeding on a diſpoſition of the *fee*, veſts only the real right of *liferent*. No 189. *Children of Graham againſt Capt. John Graham, &c. July* 4. 1759.

SEQUESTRATION. Prorogation of a leaſe, by authority of the court, upon a ſequeſtrated eſtate. No 148. *William Cawfield ſupplicant, Dec.* 19. 1758.

SERVICE AND CONFIRMATION. The fee of lands does not veſt *ipſo jure* without a ſervice in a nominatim ſubſtitute. No 23. *Capt. Livingſton againſt Lord Napier, March* 9. 1757.

A ſum taken payable to a father and his daughter, found to belong wholly to the daughter upon the father's death, without neceſſity of a general ſervice. No 39. *Wilſon againſt Sellers, July* 6. 1757.

Poſſeſſion of the moveables by the neareſt of kin veſts the right without confirmation. No 74. *Eliſabeth Brodie againſt Stewart, Dec.* 21. 1757.

Obligation by one of the neareſt of kin, decerned executor to account to his brother, who was abroad, for his ſhare, found effectual, notwithſtanding the brother's predeceaſe. *Ibid.*

A father having diſponed lands to his ſon, in his contract of marriage, with a ſubſtitution of return to himſelf, failing heirs-male of the ſon's body; and the ſon, who never took any infeftment on the contract, having died without iſſue male, it was found, That a general ſervice was neceſſary to reinſtate the father in the right of the lands, and to enable him again to convey them. No 114. *James Hay againſt Lord Charles Hay, June* 30. 1758.

The heir of a marriage may challenge deeds contrary to the marriage-contract, without a ſervice. No 202. *Sir William Moncrieff againſt the creditors of Sir Thomas Moncrieff, Dec.* 8. 1759.

A decreet-dative in favour of a neareſt in kin, without confirmation, not a ſufficient title to convey. No 213. *Suſanna Ogilvie againſt his Majeſty's advocate, Feb.* 13. 1760.

See Proviſion to heirs and children, No 255.

SERVICE OF HEIRS. *See* Repreſentation, No 114.

SERVITUDE. A perſonal ſervitude *ſpatiandi*, not ſuſtained. No 164. *Cochran againſt Fairholm, Feb.* 8. 1759.

Where a right of paſturage is duly conſtituted, it imports no diminution of the ſervitude, that the cattle, during certain months of the year, are graſed upon other grounds. No 208. *Sir Harry Monro againſt Mackenzie of Inchcoulter, Jan.* 4. 1760.

Servitude of ſea-ware for manure, acquired by an heritor, though not contiguous to the ſhore. No 221. *Earl of Morton againſt David Covingtree, June* 20. 1760.

SLAVERY. If a Negro ſlave, by being brought to Britain and chriſtened, becomes free? No 34. *Sheddan againſt a Negro, July* 4. 1757.

SOCIETY. In a proceſs againſt a company, either the whole partners or the directors muſt be called. No 54. *Stevenſon and Company againſt Macnair, &c. Nov.* 14. 1757.

SOLIDUM ET PRO RATA. *See* Tutor and Pupil, No 131. and 172.

STYLE, OLD AND NEW. A miniſter who had been ſettled before the act correcting the calendar, died on the 5th October 1755, which was after Michaelmas new ſtyle; but before Michaelmas old ſtyle: Found, That the determination of his ſtipend was to be regulated by the old ſtyle. No 30. *Anderſon againſt the executors of Home, June* 25. 1757.

The contrary found. No 124. *Peter Simſon againſt Hamilton of Pincaitland, July* 12. 1758.

SUCCESSION. *Heirs and aſſignees whatſoever* found to import heirs-male upon particular circumſtances. No 9. *Maclauchlan of St Coan's againſt Campbell, Jan.* 12. 1757.

Heritage of youngeſt brother goes to immediate elder. No 137. *Iſaac Grant againſt Peter Grant, Nov.* 29. 1758.

Seats in churches granted to heirs and neareſt repreſentatives, divide among the neareſt relations in the ſame degree. No 229. *Watſon againſt Watſons, July* 9. 1760.

SUPERIOR AND VASSAL. Upon the ſuppreſſion of a royal borough, the heritors of lands formerly held burgage within its territory, are intitled to hold of the crown. No 89. *Urquhart of Meldrum againſt Clunes of Neilſton and others, Jan.* 17. 1758.

Heirs of entail, though not heirs of line to the

the laſt infeft, muſt be entered as heirs, not as ſingular ſucceſſors, the ſuperior having acknowledged the entail by a charter and infeftment. No 231. *Lockhart of Carnwath againſt Sir Archibald Denham*, *July* 10. 1760.

Queſtion on the clan-act. No 249. *Duke of Athol againſt his Majeſty's advocate*, *Nov.* 26. 1760.

See Kirk-patrimony, No 93.

See Perſonal and Real, No 4. & 194.

See Freeholders, No 212. 215. 240.

T

TACK. An heritor having become debtor to his tenant, gave him a power to retain the rents of his farm in payment of the ſums due; other creditors of the heritor afterwards obtained infeftments upon the eſtate, adjudged, and got it ſequeſtrated: *Found*, That the rents ſubſequent to the ſequeſtration fell under the factory, but not thoſe prior. No 3. *Creditors of Lord Cranſton againſt Scot*, *Jan.* 4. 1757.

Prorogation of a tack not good againſt creditors of the heritor obtaining infeftments, or affecting the eſtate by diligence before expiry of the original leaſe. *Ibid.*

Prorogation of a tack not good againſt heritable creditors obtaining ſequeſtration before poſſeſſion commenced on the prorogation. No 32. *Creditors of Douglas of Dornock againſt Carlyles*, *July* 2. 1757.

Nullities of a tack ſupplied by the tenant's poſſeſſion. No 51. *Gordon of Badenſcoth againſt Hall*, *Aug.* 10. 1757.

A bankrupt tenant having a tack to him and his ſubtenants, ſecluding aſſignees, may effectually ſubſet his whole poſſeſſion, if the ſubtenant find ſecurity for the rent payable to the maſter. No 112. *Ronald Crawfurd againſt Maxwell and his creditors*, *June* 28. 1758.

Tack for 1140 years, if valid? No 141. *His Majeſty's advocate againſt Captain James Fraſer*, *Dec.* 6. 1758.

Tack for 1260 years ſuſtained. No 224. *Irvine*, *&c. againſt Knox and her huſband*, *June* 27. 1760.

TAILZIE. Heirs of entail in poſſeſſion may cut the whole planted timber upon the eſtate, tho' the perſon next in ſucceſſion make offer of the value. No 13. *Hamilton of Fala againſt Viſcounteſs of Oxfurd*, *Feb.* 16. 1757.

An entail appointed to be recorded upon a ſummary application by a remote ſubſtitute. No 24. *Nairne againſt Sir Thomas Nairne*, *March* 10. 1757.

Heir of entail is bound to keep down the current annualrents of debts affecting the eſtate during his poſſeſſion. No 63. ſum. 4. *Gordon againſt Major Maitland*, *Dec.* 1. 1757.

Entail wanting reſolutive clauſe, not effectual againſt creditors. No 94. *Creditors of Hepburn of Humby againſt his children*, *Feb.* 8. 1758.

Prohibition to annailzie, diſpone, wadſet, or burden, imports a prohibition to ſell. *Ibid.*

Found, That it was unneceſſary to record an entail executed and completed by infeftment prior to the act 1685. *Ibid.*

Found, That a tailzie executed before the act 1685, but upon which infeftment was not taken till after, ought to have been recorded. No 145. *Philp againſt Earl of Rothes*, *Dec.* 14. 1758.

Firſt member of entail being diſponee, not bound by reſtrictions laid on heirs of tailzie. No 100. *Erſkines againſt Mrs Mary Balfour-Hay*, *Feb.* 14. 1758.

Heir of entail taking a diſcharge as well as aſſignation to a debt of the tailzier's, can ſtill keep up the ſame as a debt againſt the entailed eſtate. No 101. *Ker of Hoſelaw againſt Turnbull*, *Feb.* 15. 1758.

An unregiſtred tailzie is a ground for reſtricting an extravagant jointure to a reaſonable proviſion. No 122. *Captain Noble againſt Anne Dewar*, *July* 12. 1758.

A tailzie not irritating the contravener's right, though inhibition be uſed upon it, does not bar a ſale. No 211. *Bryſon againſt Chapman*, *&c. Jan.* 22. 1760.

Meaning of the act, allowing entailed ſuperiorities to be ſold to the vaſſals. No 212. *Campbell of Shawfield*, *&c. againſt Muir of Caldwall*, *Feb.* 5. 1760.

An entailed eſtate becomes an unlimited fee in the perſon of the laſt ſubſtitute, if, failing him, heirs whatſoever are called. No 217. *Earl of March againſt Sir Thomas Kennedy*, *Feb.* 27. 1760.

See Indefinite intromiſſion, No 10.

TEINDS. Where heritors have poſſeſſed the teinds of their lands for payment of a certain annual ſum to the patron, the fifth part of the rent payable for ſtock and teind is the rule for valuing the teind. No 18. *Hay of Lawfield againſt Duke of Roxburgh*, *March* 2. 1757.

No deduction allowed on account of the increaſed rent of the land by the uſe of ſea-ware. *Ibid.*

The rent of an orchard deduced on valuing the teind. *Ibid.*

Whether, in conſequence of the reformation, the patrons of benefices without cure became heritable proprietors of the teinds annexed to theſe benefices? No 35. *Hay of Lawfield*, *&c. againſt Duke of Roxburgh*, *July* 6. 1757.

An adjudication without infeftment is a good title of preſcription as to teinds. No 120. *Gordon of Earlſton againſt Kennedy of Knockgray*, *July* 11. 1758.

Heritors are not bound to tranſport their valued teind-victual to a market-town. No 121. *King's College of Aberdeen againſt Lord Halkerton and others*, *July* 12. 1758.

Grounds gained from the ſea by building walls, are not ſubject to pay teinds. No 175. *Heritors of the pariſh of Inverneſs againſt the magiſtrates of Inverneſs*, *Feb.* 21. 1759.

Inhibition of teinds, executed by a party neither in poſſeſſion as titular, nor having brought any proceſs for aſcertaining his right, is inept. No 250. *The Principal and Maſters of the united colleges of St Salvator and St Leonard in the univerſity of St Andrew's, againſt Mr James Montgomery*, *Nov.* 26. 1760.

TENOR. *See* Preſumption, No 163.

TERM LEGAL AND CONVENTIONAL. *See* Style, old and new.

THIRLAGE. A thirlage of all grain imported, and tholing fire and water, does not affect ale imported. No 44. *Major Arnot againſt inhabitants of Kirkaldy*, *July* 20. 1757.

A proper barley-mill for grinding French barley, may be erected within a thirl. No 48. *Mr John Macleod againſt Roberts*, *July* 29. 1757.

A mill for ſheeling lint-bolls, and capable alſo of grinding oats, may be erected within a thirl, upon the proprietor's finding caution not to grind meal, flour, or malt, under a penalty. No 49. *Lockhart of Carnwath againſt Sir Archibald Denholm*, *July* 29. 1757.

Lands found aſtricted, notwithſtanding a clauſe *cum molendinis et multuris* in the *Tenendas*

nendas of a vaſſal's charter. No 126. *Macnab againſt the Earl of Breadalbane, &c. July* 19. 1758.

The indefinite aſtriction of lands to a mill by the proprietor of both, imports the thirlage of *omnia grana creſcentia.* No 198. *Yeaman of Blacklaw againſt the heritors and tenants of Grange, Nov.* 17. 1759.

Clauſe *cum molendinis* in the *Tenendas*, without poſſeſſion of immunity, does not diſcharge an aſtriction. *Ibid.*

Thirlage of victual in general does not comprehend wheat, where the mill is not properly conſtructed for grinding it, and no dry multure in uſe to be paid. No 235. *Couſton againſt tenants of Pitreavie, July* 16. 1760.

TITLE TO PURSUE. A truſt-adjudication againſt an apparent heir under an unregiſtred tailzie, is a good title to purſue reduction of rights affecting the eſtate. No 122. *Captain Noble againſt Anne Dewar, July* 12. 1758.

See Foreign, No 203.

TRANSUMPT. Regular proceſs neceſſary for making tranſumpts. No 98. *Duncans againſt Bucknay, Feb.* 14. 1758.

TUTOR AND PUPIL. Tutors authoriſed to ſell an heritable ſubject for the utility of the pupil, though not neceſſary on account of debts. No 21. *Plummer againſt his relations, March* 8. 1757.

Five perſons being named tutors, and, failing them, other ſix perſons, *any two of them being a quorum*, it was found, that the firſt nomination had not failed though one of the two perſons named was dead. No 131. *Children of Fiſher againſt their tutors and curators, Aug.* 2. 1758.

A quorum of the tutors of infant-pupils, and not the mother, though one of them, found intitled to direct their education and place of reſidence. No 172. *Scots againſt Eliſabeth Scot, Feb.* 16. 1759.

V

VIRTUAL. *See* Infeftment, No 39.

W

WADSET. *See* Perſonal and Real, No 22.

See Arreſtment, No 102.

See Freeholders, No 215.

WITNESS. Common brother rejected as a witneſs. No 31. *Beugo againſt Beugo, June* 27. 1757.

Servants admitted as witneſſes in behalf of their maſters *ubi eſt penuria.* No 70. *Fairly againſt Bannatyne & Co. Dec.* 16. 1757.

Objection to a witneſs, That he might gain or loſe by the cauſe, ſuſtained. No 190. *Bluſchet againſt Chriſtie, July* 5. 1759.

WRIT. Indenture ſigned by one notary and three witneſſes can only produce action to the extent of L. 100 Scots. No 113. *Ferguſon againſt Macpherſon, June* 30. 1758.

How far can ſuch writ be ſupported by homologation? *Ibid.*

Objection to a mutual contract, ſubſcribed by both parties, but bearing only in the teſting clauſe, "ſubſcribed by my hand," repelled. No 165. *Dunbar of Boath againſt Sir Harry Innes, Feb.* 9. 1759.

Objection ſuſtained to a teſtament ſigned by notaries, That the witneſſes did not hear the defunct give orders for ſigning, nor ſee her touch the pen. No 222. *Farmers againſt Myles, &c. June* 25. 1760.

Stamping an extract of an indenture found ſufficient. No 267. *Shepherd againſt Innes, Nov.* 19. 1760.

FINIS.

To the BINDER.

Cut off the interim title-page which was prefixed to the portion of this volume formerly publiſhed, and inſtead of it place the proper title-page and the four leaves of ſummaries at the beginning of the volume.